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## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1938 9

No. ~~715~~ 13

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KIM YOUNG, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

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APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR  
COURT OF LOS ANGELES COUNTY, CALIFORNIA

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FILED MARCH 1, 1939.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 715

KIM YOUNG, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR  
COURT OF LOS ANGELES COUNTY, CALIFORNIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 26, 1939.

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[fol. 1] Citation, in usual form, filed February 20, 1939, omitted in printing.

[fol. 2]

**IN MUNICIPAL COURT OF CITY OF LOS ANGELES**

No. 82837

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

KIM YOUNG, Defendant and Appellant

NOTICE OF APPEAL—Filed October 6, 1938

To the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California:

Notice is hereby given that the defendant Kim Young intends to and hereby does appeal from the judgment and sentence in this cause to the Appellate Department of the Superior Court of the County of Los Angeles, State of California.

Gallagher, Wirin & Johnson, by A. L. Wirin, Attorneys for Defendant.

(Endorsed:) No. CR A 1547. Received copy of the within Notice this 16 day of Sept. 1938. G. W. Adams, D. C. A., Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 3] IN MUNICIPAL COURT OF CITY OF LOS ANGELES

**ENGROSSED STATEMENT ON APPEAL**

Be it Remembered that pursuant to, and in accordance with, the Order and Judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, made and entered on the 29th day of July, 1938, reversing the judgment of dismissal theretofore entered in the above entitled cause and remand-

ing said cause to the Municipal Court for further proceedings, said matter came on regularly for trial before Judge Alfred E. Paonessa in Division 6 of the above entitled court upon assignment from Division 7 thereof, on the 7th day of September, 1938, the plaintiff and respondent appearing by Ray L. Chesebro, City Attorney and by David M. Hoffman, Deputy City Attorney and the defendant and appellant appearing by Gallagher, Wirin and Johnson, by Leo Gallagher.

The defendant was charged with a Violation of Section 28.01 of the Los Angeles Municipal Code (Ordinance No. 77,000), as fully set forth in the complaint on file herein.

Thereupon objections by the defendant that the said Ordinance on its face and as applied to the defendant was [fol. 4] unconstitutional and void and of no force and effect, on the ground that it constitutes a denial of freedom of speech and freedom of the press, as guaranteed to the defendant by the due process clause of the Fourteenth Amendment to the Constitution of the United States, were overruled by the court.

Evidence was introduced by the People that the defendant, on the 17th day of March, 1938, on a public sidewalk in the City of Los Angeles, County of Los Angeles, State of California, adjacent to the Shrine Auditorium in said City, distributed handbills to pedestrians upon said sidewalk, a copy of the handbills so distributed being introduced in evidence and marked People's Exhibit "A", which said exhibit is hereto annexed. The evidence also showed by stipulation that the defendant had at the same time and place, more than three hundred (300) handbills of the same type and nature as the handbills introduced in evidence, which said handbills the defendant was proceeding to distribute to persons on said sidewalk.

Thereupon the defendant gave a notice of intention to move for a new trial, and on the 13th day of September, 1938, said defendant by his counsel urged that a new trial be granted on the ground that said Ordinance was not constitutional on its face and as applied to the defendant, in that it denies to defendant due process of law under the 14th Amendment to the Constitution of the United States [fol. 5] and freedom of speech and freedom of press under the First and Fourteenth Amendments to the Constitution of the United States.

The court denied said motion for a new trial and imposed a sentence of five days in the City Jail, which said sentence the said court suspended.

Defendant and Appellant appeals from the said judgment and sentence on the following grounds, to-wit:

1. That Los Angeles Municipal Code, Section 28.01 (Ordinance 77,000) is unconstitutional and void and of no force and effect in that said Ordinance on its face denies to the defendant due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and freedom of speech and freedom of press, as provided in the First and Fourteenth Amendments to the Constitution of the United States;

2. That said Ordinance, as applied, administered and enforced against the defendant and appellant, denies to said defendant and appellant due process of law under the Fourteenth Amendment to the Constitution of the United States and freedom of speech and freedom of the press under the First and Fourteenth Amendment to the Constitution of the United States, in that the handbill alleged to [fol. 6] have been distributed by the defendant was and is a political, as distinguished from a commercial, handbill;

3. That the judgment and sentence of said court constitutes a denial to the defendant of due process of law under the Fourteenth Amendment to the Constitution of the United States and of freedom of speech and of the press, in that said judgment and order and said Ordinance fail to establish a reasonably ascertainable standard of guilt, and fail to adopt and correctly to apply the "clear and present danger" rule.

4. That said judgment and sentence are, and each of them is, in contravention of the decision of the Supreme Court of the United States in *Lovell v. Griffin*, 82 L. Ed. (Adv. Op.) 660.

The court does now hereby settle and allow the foregoing Engrossed Statement on Appeal and certifies that the same is a full, true and correct statement of all of the testimony, evidence and proceedings had and received in said cause.

Dated this 4th day of October, 1938.

Alfred E. Paonessa, Judge of the Municipal Court.

4  
[fol. 7] EXHIBIT "A" TO STATEMENT ON APPEAL

BACK FROM  
WAR-TORN SPAIN

Captain:  
HANS AMLIE

Commander Lincoln Battalion  
Brother of Congressman Amlie

JAY ALLEN  
War Correspondent Expelled From Rebel Spain

PEPI JUNEDA  
Famous Spanish Dancer

PILAR ARCOS  
Spanish Actress and Singer

Chairman, LILLIAN HELLMAN  
Screen writer and playwright

TRINITY AUDITORIUM  
847 So. Grand Ave.

March 21, —:— 8:00 P. M.  
Admission 25¢ and 50¢

AUSPICES: FRIENDS LINCOLN BRIGADE  
333 W. 2nd St. —:— Mi. 7926

[fols. 8-9] Affidavit of service of statement on appeal  
omitted in printing.

[fol. 10] IN APPELLATE DEPARTMENT OF SUPERIOR COURT,  
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Superior Court No. CR A 1547

Trial Court No. 82837

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Re-  
spondent,

vs.

KIM YOUNG, Defendant and Appellant.

Appeal by defendant from a judgment of the Municipal  
Court of the City of Los Angeles, of conviction of violation

of section 28.01 of the Los Angeles Municipal Code. A. E. Paonessa, Judge. Affirmed.

For Appellant—A. L. Wirin.

For Respondent—Ray L. Chesebro, City Attorney, W. Jos. McFarland, Assistant City Attorney, and John L. Bland, Deputy City Attorney.

OPINION—Filed December 9, 1938

The provisions of the Municipal Code of the City of Los Angeles, which prohibit the distribution of handbills to pedestrians on the sidewalks of the city, do not, under the authorities, so infringe any constitutional right that they may be held inoperative. The judgment that the defendant-appellant pay a fine of \$25.00 for violating the ordinance is, therefore, to be affirmed.

The provisions of the Municipal Code which are involved appear in sections 28.00 and 28.01. There we find that "No [fol. 11] person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to or upon any automobile or other vehicle" and by way of definition it is declared that "Hand-Bill shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

It may at times be a close question of fact, whether a person is actually "distributing" cards, which the municipal code prohibits, or whether he is passing out a card or two as an isolated casual or occasional act, which, under a proper interpretation of its provisions, the code does not prohibit. *Anderson v. State*, (1903) 69 Neb. 686, 689, 96 N. W. 149, 150, 5 Ann. Cas. 421; *Coughlin v. Sullivan*, (1924) 100 N. J. L. 42, 126 Atl. 177; *Milwaukee v. Kassen*, (1931) 203 Wis. 383, 234 N. W. 352, 354. In this case, however, it plainly appears that the defendant was engaged in the distribution of cards. He had in his possession over three hundred colored cards, three and a half by five and a half inches in size; some of these he had already given to pedestrians on the sidewalk adjacent to the Shrine Auditorium, and it was stipulated, he was "proceeding to distribute" the rest to other persons on the sidewalk. Obviously, the defendant violated the provisions of the Municipal Code,

[fol. 12] as he was charged with doing, and the judgment imposing sentence upon him must be affirmed unless in some way the state or federal constitution is offended by those provisions.

The Municipal Code's endeavor to create a public offense is futile, it is claimed, because contrary to the right to speak and publish freely, safeguarded by Art. I, section 9, of our state constitution, and by the Fourteenth Amendment to the federal constitution. The language of the former is: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The Fourteenth Amendment does not in terms protect against an invasion of the right freely to speak and to publish, but in its fending against the deprivation of liberty, without due process, the right is held to be fully guarded. *Lovell v. Griffin*, (1938) 82 Law. ed. Adv. Op. 660, 58 Sup. Ct. 666, and cases cited.

The right to speak and to publish freely is not an absolute one, free from all legislative control. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic." *Schenck v. United States*, (1919) 249 U. S. 47, 63 L. ed. 470, 473. "That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical [fol. 13] to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." *Gitlow v. New York*, (1925) 268 U. S. 652, 69 L. ed. 1138, 1146. Reasonable restrictions may be placed upon the time and place of the exercise of the right of free expression, as well as upon its content. In spite of the uncompromising language of our constitution, it was held in *In re Thomas*, (1909) 10 Cal. App. 375, that the city of Los Angeles could validly prohibit the making of a public speech in any public park or on any street, within a defined district. A similar ordinance of the city of Boston, prohibiting all public addresses, without a permit, in any of the public grounds of the city, was upheld by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Davis*, (1895) 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, the opinion being written by Mr. Justice Holmes, and it was thereafter held valid by the Supreme Court of the United States, in *Davis v. Commonwealth*, (1897) 167 U. S. 43,

42 L. ed. 71, 17 S. Ct. 731. The New York Court of Appeals held such a prohibitory ordinance to be constitutional in *People v. Atwell*; (1921) 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 107 (Mr. Justice Cardozo concurring specially) and again in *People v. Smith*, (1934) 263 N. Y. 255, 188 N. E. 745. Still other cases, in accord, are reviewed in *Coughlin v. Chicago Park Dist.*, (1936) 364 Ill. 90, 4 N. E. (2d) 1, itself [Vol. 14] reaching the same conclusion. While it may be said, as it was in the case of *People v. Smith*, *supra*, that an ordinance such as we have just been considering "is not aimed at free speech," it is plain that it nevertheless hits it. An ordinance which declares that one may not speak within a defined district, to that extent abridges the right to speak freely. Although there is an abridgement; the ordinance may still be valid, if the abridgement is not the end sought by the ordinance, but is merely incidental to the operation of the means reasonably adopted to attain a lawful end. Such is the witness of the cases.

We do not subscribe to the doctrine that the city council could prohibit the distribution of handbills on the city streets in the absence of any public interest to be served by the prohibition, just because the streets are "city" streets, under the council's charge; we hold that no restraint may validly be placed by public authority upon the constitutional right of free expression, whether it be to speak, pen or print, even upon the public streets, which is not justified by the evils which lack of restraint would bring about. We may not, however, substitute our judgment for the city council's in determining how far, within the extreme limits of reason, the threatened evils require restrictions on the exercise of a constitutional right. It is only when we can [Vol. 15] say that clearly the line of reasonable debate has been passed that we have the right to declare invalid the deliberate act of legislative body of the city.

Looking at the code before us, we cannot say that the city council had no reasonable cause for prohibiting the distribution of handbills on the sidewalks of the city, or that the city council acted arbitrarily in determining that some measure other than, or short of, such prohibition would not meet the needs reasonably well. Experience teaches that the immediate result of the indiscriminate distribution of handbills on public streets is the littering of those streets. Curiosity and courtesy would induce most persons to take one of the cards offered by appellant; a glance, and lack

of further interest, would release it from the hand. Those who are charged by law with determining the public policy which shall govern, may well have seen the problem as it was stated in *Anderson v. State*, supra, 69 Neb. 686, 96 N. W. 149, 150, 5 Ann. Cas. 241, as quoted in *City of Milwaukee v. Kassen*, (1931) 203 Wis. 383, 234 N. W. 352, 353: "The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the streets in an unclean and filthy condition." The evil against which the code appears to have been directed [fol. 16] is to be measured not merely by appellant's three hundred cards, but by the flood which might reasonably be expected if the code ceased to operate as a dike.

It has been argued that the remedy for littered streets is not to prohibit the distribution of handbills, but to enforce the laws against letting them fall on the street or sidewalk. But in order effectually to prevent the accomplishment of something regarded as an evil, it is often found best, by those who determine the public policy, to prohibit an act, innocent in itself, but which is in the chain of events leading to the evil. Of laws founded on this principle our federal Supreme Court stated in *Purity Extract & T. Co. v. Lynch*, (1912) 226 U. S. 192, 57 L. ed. 184, 185: "It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of government. (Cases cited.) With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended."

Our conclusion that the individual's exercise of his constitutional right of free expression may be curbed by forbidding the distribution of handbills on public streets, finds support in the authorities. See *Anderson v. State*, supra, (1903) 69 Neb. 686, 96 N. W. 149; *City of Milwaukee v. Kassen*, supra, 203 Wis. 383, 234 N. W. 352; *Almassi v. City of Newark*, (N. J. Com. Pl.) (1930) 150 A. 217; *Commonwealth v. Kimball*, (1938) — Mass. — 13 N. E. (2d) 18, 114 A. L. R. 1440. In support of principles

on which, in part, our conclusion is based, we find *People v. St. John*, (1930) 108 Cal. App. 779, 288 P. 53; *Sieroty v. City of Huntington Park*, (1931) 111 Cal. App. 377; and *San Francisco Shopping News Co. v. City of South San Francisco*, (1934) 69 F. (2d) 879 (certiorari denied, 293 U. S. 606). There are authorities not in harmony with our conclusion, as may be discovered in the notes in 22 A. L. R. 1484 and 114 A. L. R. 1446. In connection with some of these cases, those that are based in part on a strict construction of legislative grants of power to municipalities, this should be noted respecting the police power of California cities; within their boundaries they exercise "the entire police power of the state, subject only to the control of general laws." Sec. 11, Art. XI, State Constitution; *In re Maas*, (1933) 219 Cal. 422, 425.

Appellant earnestly urges that *Lovell v. Griffin*, supra, 82 Law ed. Adv. Op., 58 Sup. Ct. 666, is an authority requiring us to reverse this judgment. But we find nothing in the decision in that case to cause us to doubt the correctness [fol. 18] of our conclusion. The ordinance under consideration there differs from ours in a vital particular appearing in the supreme court's characterization of it: "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager.

The distinction to which we refer is not, that under the *Griffin* city ordinance distribution of pamphlets would be possible were a permit obtained, while no permit is provided for under our ordinance. In effect the two ordinances are identical in this regard, for the supreme court looked upon the permit feature as a nullity; the ordinance with it, was measured as though it were without it. The circumstance that some of the ordinances prohibiting speaking in public parks and streets, permitted the speaking if a permit was obtained, was not made the basis of approving the ordinance in any of the cases we noted. The absence, in our ordinance,

[fol. 19] of any provision for a permit, neither strengthens it nor does it invalidate it.

The distinction between the Griffin city ordinance and the Los Angeles code which is both vital and obvious, is that the former prohibited the distribution of handbills and cards anywhere in the city, while the latter prohibits their distribution only in a very limited number of places, which cannot be said to be wholly unconnected with public welfare. The supreme court did not indulge in obiter dictum; that is, it did not say that an ordinance such as ours would be valid or invalid. It did point out, however, that the ordinance which it determined denied due process, was distinguishable from an ordinance such as ours in the particular we have emphasized, and thus did not extend its disapproval to an ordinance guarding against the littering of streets, which our ordinance (code) does.

Up to this point we have considered the validity of the provisions of the municipal code in question solely from the standpoint of the attack made upon them that they are destructive of the right freely to express one's views. It may be, however, that the real constitutional right involved is that rescued from an ordinance such as ours by *In re Thornburg*, (1936) 55 Ohio App. 229, 9 N. E. (2d) 516, where it was held that as the right to engage in business is a property right, to prevent one from advertising his business, by passing out cards on the sidewalk, is to deprive one of his property without due process. The cards which appellant [fol. 20] was distributing bore this message:

“Back from  
WAR-TORN SPAIN

Captain  
HANS AMLIE

Commander Lincoln Battalion  
Brother of Congressman Amlie

JAY ALLEN  
War Correspondent Expelled from Rebel Spain

PEPI JUNEDA  
Famous Spanish Dancer

PILAR ARCOS  
 Spanish Actress and Singer  
 Chairman, LILLIAN HELLMAN  
 Screen Writer and Playwright

TRINITY AUDITORIUM  
 847 So. Grand Ave.

March 21, —:— 8:00 P. M.

Admission 25¢ and 50¢

AUSPICES: FRIENDS LINCOLN BRIGADE

333 W. 2nd St. —:— ML 7926

Mercury Printing Co., 855 N. Western Ave."

Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views.

But if this be so, our conclusion is not thereby changed. We do not find the constitutional prohibition against deprivation of property without due process to be superior to that which protects one from being deprived of his liberty [fol. 21] without due process; the latter is not, any more than the former, an absolute right; each may be abridged by a reasonable exercise of the police power for the public benefit. Indeed, if we had to choose, we should follow *Coughlin v. Sullivan*, supra, 100 N. J. L. 42, 126 A. 177, in finding it easier to uphold an ordinance forbidding the distribution of commercial handbills than one prohibiting the distribution of handbills intended to express one's views on questions of public concern.

For the foregoing reasons, we are of the opinion that the judgment of conviction should be, and it is, affirmed.

Dated December 9, 1938.

Bishop, Judge.

We concur: Shaw, Presiding Judge. Schauer, Judge.

[File endorsement omitted.]

[fol. 22] IN APPELLATE DEPARTMENT OF SUPERIOR COURT OF  
LOS ANGELES COUNTY.

[Title omitted]

PETITION FOR REHEARING—Filed December 14, 1938

Comes now defendant and respondent and petitions the above entitled court for rehearing, and prays that the court order a rehearing of the above entitled matter and set aside its judgment and order herein.

That the grounds of said petition are as follows:

1. That the judgment, order and decision of the court constitutes a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States in that it denies to the defendant freedom of speech and freedom of the press.
2. That the judgment, order and decision of the court constitutes a denial to the defendant of due process of law under the Fourteenth Amendment to the Constitution of the United States and of freedom of speech and of the press in that it fails to establish a reasonably ascertainable standard of guilt and fails to adopt and correctly apply the clear and present danger rule.

3. That the judgment, order and decision of the court is [fol. 23] in contravention of the decision of the Supreme Court of the United States in *Lovell vs. Griffin*, 303 U. S. 444.

Respectfully submitted, Gallagher; Wirin and Johnson, by A. L. Wirin.

Dated at Los Angeles; December 14th, 1938.

(Endorsed:) No. CR A 1547. Received copy of the within petition, this 14 day of March, 1938. John L. Bland, D. C. A., Attorney for Respt.

[File endorsement omitted.]

[fol. 24] IN APPELLATE DEPARTMENT OF SUPERIOR COURT OF  
LOS ANGELES COUNTY

[Title omitted]

ORDER DENYING REHEARING—Filed December 14, 1938

Appellant's petition for a rehearing after judgment in the above entitled cause having been filed, and said petition having been duly considered,

It is Now Ordered that the said petition be, and the same is, hereby denied.

Dated December 14, 1938.

By the Court.

Shaw, Presiding Judge. Bishop, Judge. Schauer, Judge.

[File endorsement omitted.]

[fol. 25] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed February 20, 1939

Considering himself aggrieved by the Final Judgment and Decision of the Appellate Department of the Superior Court of the County of Los Angeles, State of California, in the above entitled cause, the petitioner hereby prays that an appeal be allowed to the Supreme Court of the United States.

#### SUMMARY STATEMENT OF THE CASE

The validity of a statute of the State of California within the meaning and intent of Section 237 (a) of the Judicial Code of the United States is drawn into question upon the grounds that said statute deprives appellant of liberty without due process of law and denies him freedom of speech and freedom of the press, as guaranteed by the Fourteenth [fol. 26] Amendment to the Constitution of the United States, said statute being a Municipal Ordinance of the City of Los Angeles, No. 77,000, sections 28.00 and 28.01, thereof.

The appellant was convicted in the Municipal Court of the City of Los Angeles for a violation of said Municipal Ordinance in that the appellant distributed to and among pedestrians on the streets of the City of Los Angeles a handbill, or card, announcing a public meeting in the Trinity Auditorium in the City of Los Angeles, under the auspices of the Friends of the Lincoln Brigade.

The judgment and decision of the Appellate Department of the Superior Court of Los Angeles County, State of California, upheld and sustained said ordinance and rejected the contentions of the appellant that the Municipal Ordinance was unconstitutional under the Fourteenth Amendment to the Constitution of the United States.

The Opinion of the Appellate Department of the Superior Court is reported in 3 Cal. App. Supp. 62. The Judgment and Decision of the Appellate Department, as aforesaid, is a judgment of the court of last resort of the State of California in this case. Said judgment and decision was made and entered on the 9th day of December, 1938.

#### ASSIGNMENT OF ERRORS

The appellant assigns the following errors in the record [fol. 27] and proceedings in said case:

1. The Appellate Department of the Superior Court of Los Angeles County erred in its decision and judgment that Los Angeles municipal ordinance, section 28.00 and section 28.01, on its face and as enforced and applied to the appellant is valid and constitutional, and does not deprive the appellant of due process of law under the Fourteenth Amendment to the Constitution of the United States by denying the appellant freedom of speech and freedom of the press as guaranteed by said due process clause.

2. Said Superior Court erred in its decision and judgment in failing to adjudge said ordinance unconstitutional, as denying freedom of speech and freedom of the press under the Fourteenth Amendment to the Constitution of the United States in that said ordinance, on its face and as applied and enforced against the appellant, does not comply with the "clear and present danger" rule as enunciated by the Supreme Court of the United States; and in that said court failed to apply said rule in the instant case.

3. That said Superior Court erred in its decision and judgment in that it failed to rule and decide that Los Angeles municipal ordinance, section 28.00 and section 28.01, was and is unconstitutional by virtue of the decision of the Supreme Court of the United States in *Lovell vs. Griffin*, 303 U. S. 444.

#### PRAYER FOR REVERSAL

For which errors appellant prays that said judgment of the Appellate Department of the Superior Court of Los Angeles County, State of California, dated December 9,

1938, in the above entitled cause be reversed and a judgment rendered in favor of appellant, and for costs.

Gallagher, Wirin & Johnson, by A. L. Wirin, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 69] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 20, 1939.

The appellant in the above entitled matter, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled matter by the Appellate Department of the Superior Court of Los Angeles County, State of California, on the 9th day of December, 1938, and from each and every part thereof, and having presented his petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It Is Now Ordered that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the Appellate Department of the Superior Court of [fol. 70] Los Angeles County, State of California, in the above entitled cause, as provided by law, and It Is Further Ordered that the Clerk of the Appellate Department of said Superior Court shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within sixty days of this date, and it is Further Ordered that security for costs on appeal be fixed in the sum of \$250.00.

Dated this 20th day of February, 1939.

Hartley Shaw, Presiding Judge, Appellate Department, Superior Court of Los Angeles County, State of California.

[File endorsement omitted.]

[fols. 71-77] Bond on Appeal for \$250.00, approved and filed February 20, 1939, omitted in printing.

[fol. 78] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed February 20, 1939

It Is Hereby Stipulated by and between the parties in the above entitled cause, through their counsel, that the following portions of the record be included in the transcript of the record in the above entitled cause to be prepared by the Clerk of the Appellate Department of the Superior Court, Los Angeles County, State of California, and to be transmitted to the Supreme Court of the United States:

1. Engrossed Statement on Appeal, dated Oct. 5, 1938
2. Complaint against defendant
3. Minutes of Municipal Court
4. Opinion of Court, dated December 9, 1938
5. Petition for Re-Hearing
6. Petition for Appeal, Assignment of Errors, and Prayer [fols. 79-83] for Reversal
7. Statement as to Jurisdiction
8. Order Allowing Appeal
9. Bond on Appeal
10. Citation
11. Notice Re: Rule 12, Paragraph 3, United States Supreme Court Rules
12. Acknowledgment of Service of Appeal Papers Upon Appellee
13. This Stipulation Indicating the Portions of the Record to be Included in the Transcript.

Dated this 20 day of February, 1939.

Gallagher, Wirin & Johnson, by A. L. Wirin, Counsel for Appellant. Ray L. Chesebro, City Attorney; W. Jos. MacFarland, Assistant City Attorney; John L. Bland, Deputy City Attorney, by John L. Bland, Counsel for Appellee.

[File endorsement omitted.]

[fol. 84]

39590.

## IN MUNICIPAL COURT OF CITY OF LOS ANGELES

[Title omitted]

COMPLAINT—Filed March 18, 1938

Personally appeared before me, this day of Mar. 18, 1938, C. L. Behrendt of Los Angeles City, who, first being duly sworn, complains and says:

That on or about the day of Mar. 17, 1938, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: Violation of Section 28.01 of the Los Angeles Municipal Code (Ord. No. 77,000) was committed by Kim Young (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully distribute, in the City of Los Angeles, a handbill to and among pedestrians along and upon a street, sidewalk and park, and to passengers on a street car, and throw, place and attach a handbill in, to and upon an automobile and other vehicle.

All of which is contrary to the form of the Ordinances and Resolutions adopted and approved by the Municipal [fol. 85] authorities of said City, in such cases made and provided, and against the peace and dignity of the People of the State of California.

Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant (whose true name to affiant is unknown) and that he may be dealt with according to law.

C. L. Behrendt.

Subscribed and sworn to before me this day of Mar. 18, 1938. W. S. Dinsmore, Clerk of the Municipal Court of Los Angeles City, in said County and State, by J. Nicolais, Deputy Clerk. (Seal.)

(L. A. M. C. 28.01.)

[fols. 86-87] [File endorsement omitted.]

Issued by Ray L. Chesebro, City Attorney, by Robt. G. Wheeler, Deputy City Attorney.

Rob't. G. Wheeler.

Witnesses: M. J. Hess 1322, W. S. Jamison 846 (RU) (MET RU).

Clerk's certificate to foregoing paper omitted in printing.

[fol. 88] IN MUNICIPAL COURT OF CITY OF LOS ANGELES

[Title omitted]

### Minute Entries

Mar. 18, 1938. Complaint filed sworn to by C. L. Beffrendt charging the Defendant with having on Mar. 17, 1938 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: Violation of Sec. 28.01 Ord. 77,000.

Mar. 18, 1938. \$25—Cash Bail posted—Receipt 55871-H.

### ARRAIGNMENT AND PLEA

Mar. 18, 1938. Cause called. Judge Kaufman presiding. Both parties ready. People represented by Rob't G. Wheeler (D. C. A.), Defendant in Pro. Per. Defendant in court, duly arraigned, informed of the charge against him, and of his legal rights. Defendant gives true name as charged and enters his plea of not guilty of the offense charged. Defendant in open court personally demands jury trial. Jury trial set for Mar. 25, 1938 at 9:30 A. M. in Div. 7. Bail Set at \$25.

[fol. 89] Mar. 25, 1938. Transferred to Div. 6 for trial.

Mar. 25, 1938. Cause called. Judge Call presiding. Both parties ready. People represented by E. Shinn (D. C. A.). Defendant in court and represented by Leo Gallagher.

Mar. 25, 1938. Cause continued for trial to Mar. 28, 1938 at 10 A. M. because of crowded calendar.

Mar. 28, 1938. Cause called. Judge Call presiding. Both parties ready. People represented by E. Shinn (D. C. A.). Defendant in court and represented by Leo Gallagher. Cause continued for trial to Mar. 29, 1938 at 10 A. M. because of crowded calendar.

Mar. 29, 1938. Cause called. Judge Call presiding. Both parties ready. People represented by E. Shinn (D. C. A.). Defendant in court and represented by Leo Gallagher. Cause continued to Mar. 30, 1938 at 10 A. M. for trial.

### ORDER OF DISMISSAL

Mar. 30, 1938. Cause called. Judge Call presiding. Both parties ready. People represented by E. Shinn (D. C. A.).

[fol. 90] Defendant in court and represented by Leo Gallagher.

It appearing to the Court that because of a recent United States Supreme Court decision, the ordinance under which this Defendant is charged is declared unconstitutional, and the case dismissed.

Bail Ordered Exonerated and ordered returned to Alexander Riskin.

#### NOTICE OF APPEAL

Mar. 31, 1938. Written Notice of Appeal filed.

Mar. 31, 1938. Plaintiff's proposed Statement on Appeal filed.

Apr. 7, 1938. Cause called. Judge Call presiding. People not represented. Defendant not represented. Cause set for settlement of Statement of Appeal for Apr. 15, 1938 at 9:30 A. M. in Div. 6.

Apr. 15, 1938. Cause called. Judge Call presiding. Both parties ready. People represented by E. Shinn (D. C. A.) Defendant in court and represented by Leo Gallagher. Statement on Appeal settled. E. Shinn (D. C. A.) to prepare a re-draft of Statement including and attaching thereto [fol. 91] a copy of the Handbill involved.

Apr. 19, 1938. Settled Engrossed Statement on Appeal filed.

Apr. 20, 1938. Files on Appeal transmitted to Superior Court.

#### REMITTITUR OF SUPERIOR COURT

Aug. 10, 1938. Remittitur and Memorandum Opinion returned and filed. Judgment reversed and cause remanded for new trial.

Aug. 17, 1938. Cause called. Judge Freund presiding. Both parties ready. People represented by E. W. Lewis (D. C. A.), Defendant in court in Pro. Per. Cause reset for a jury trial Sep. 7, 1938 at 9:30 A. M. in Div. 7. Defendant released on own recognizance.

Sep. 7, 1938. Cause called. Judge Freund presiding. Both parties ready. People represented by H. McDonald (D. C. A.). Defendant in court and represented by Leo Gallagher. Transferred to Div. 6 for trial.

## ARGUMENT AND SUBMISSION

Sep. 7, 1938. Cause called. Judge Paonessa presiding. Both parties ready. People represented by D. Hoffman [fol. 92] (D. C. A.). Defendant in court and represented by Leo Gallagher. The following jurors were sworn, examined and accepted:

- |                      |                       |
|----------------------|-----------------------|
| 1. Floretta Burdick. | 7. Bessie Solot.      |
| 2. John Watson.      | 8. Minnie Currier.    |
| 3. Alice Troupe.     | 9. Nathan Schiller.   |
| 4. Howard Gunn.      | 10. Esther Wilson.    |
| 5. Ashbury Winchel.  | 11. Geraldine Newton. |
| 6. Theron C. Wilson. | 12. Helen Swanson.    |

Jury sworn to try cause.

Witnesses for People: Merle J. Hess; stipulated other Officer, W. S. Jamison, would testify the same. Exhibits filed: People's #1 and #1-A (Handbills). Witnesses for Defendant: Merle J. Hess, Jas. Lundrigan, Leo A. Kelly, Richard R. Romans, C. H. Holden, H. C. Bryan, Henry C. Wolpin, Chas. L. Knapp, John J. Monogue, Rob't F. Grady, Gilbert W. Johnston. Recess until 2 P. M. Jury admonished. At 2 P. M., Defendant, counsel and jury present.

Witnesses for Defendant: I. Roseman, Kim Young, Jas. E. Davis, Kim Young (recalled). Both sides rest. Cause argued in part by People. Cause re-opened. On motion of Defendant, witness for Defendant: Erzel Daniel. Both sides again rest. Argument concluded. Instructions given and attached to complaint.

[fol. 93]

## VERDICT OF JURY

Jury retired this Sep. 7, 1938 at 3:37 P. M. in charge of Bailiff Turner duly sworn. At this 5:34 P. M., jury returned into court with the following verdict:

"We, the Jury in the above entitled cause, find the Defendant guilty of the offense charged."

Floretta Burdick, Forewoman. Verdict filed. Defendant makes oral motion for a new trial.

Sep. 7, 1938. Cause continued to Sep. 12, 1938, at 2 P. M. for hearing on motion for a new trial and sentence.

Sep. 12, 1938. Cause called. Judge Paonessa presiding. Both parties ready. People represented by D. Hoffman (D. C. A.). Defendant in court and represented by Leo Gallagher.

Motion for a new trial and sentence continued to Sep. 13, 1938 at 2 P. M. in Div. 14 at request of Defendant.

#### ORDER DENYING MOTION FOR NEW TRIAL

Sep. 13, 1938. Cause called. Judge Paonessa presiding. Both parties ready. People represented by D. Hoffman (D. C. A.). Defendant in court and represented by Leo Gallagher.

Motion of Defendant for a new trial denied.

[fol. 94]

#### JUDGMENT

Defendant in court and having been duly arraigned for judgment, and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court that for the said offense Violation of Sec. 28.01, Ord. 77,000 the said Kim Young be fined in the sum of 25 dollars and that in default of the payment of said fine on or before 5 o'clock P. M. of Sep. 13, 1938 the said Kim Young be imprisoned in the City Jail of said Los Angeles City in the proportion of one day's imprisonment for each and every 5 dollars of said fine until the said fine be wholly satisfied, not exceeding 5 days, and that the Defendant be discharged on payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed.

Sep. 13, 1938. Sentence Suspended.

#### NOTICE OF APPEAL

Sep. 16, 1938. Written Notice of Appeal filed.

Sep. 21, 1938. Defendant's Proposed Statement on Appeal filed.

Sep. 26, 1938. Respondent's Proposed Amendments to Appellant's Proposed Statement on Appeal filed.

[fol. 95] Sep. 26, 1938. Settlement of Defendant's Statement on Appeal set for Oct. 4, 1938 at 11:30 A. M. in Div. 14. Counsel notified.

Sep. 28, 1938. Cause called. Judge Paonessa presiding. Both parties ready. People represented by D. M. Hoffman (D. C. A.). Defendant in court and represented by A. L. Wirin.

Settlement of Defendant's Statement on Appeal. Defendant's counsel states that he has no objections to the People's Proposed Amendments.

People to prepare Engrossed Statement on Appeal. Copy of People's Exhibit "1" ordered attached to Engrossed Statement on Appeal.

Oct. 5, 1938. Settled Engrossed Statement on Appeal filed.

Oct. 6, 1938. Files on Appeal transmitted to Superior Court.

#### REMITTITUR OF SUPERIOR COURT

Dec. 16, 1938. Remittitur returned and filed—Judgment affirmed—Order denying rehearing—Opinion—filed.

[fol. 96] I hereby certify that the above and foregoing is a full, true and correct copy and transcript of the docket in the within named cause.

K. L. Holaday, Clerk of Municipal Court, City of Los Angeles, County of Los Angeles, State of California, by Katherine Christensen, Deputy. (Seal.)

February 23, 1939.

[File endorsement omitted.]

[fols. 97-98] Clerk's certificate to foregoing transcript omitted in printing.

#### [fol. 99] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed March 8, 1939.

Appellant intends to rely upon the following points and, in support thereof, states that he believes that the entire record is necessary for the consideration thereof:

1. The ordinance under which appellant was convicted (Los Angeles Municipal Code Section 28.01) is unconstitutional on its face in that said ordinance violates appellant's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States by denying him freedom of speech and freedom of the press.

2. The ordinance under which appellant was convicted (Los Angeles Municipal Code Section 28.01) is unconstitutional as applied to appellant in that said ordinance denies appellant due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Dated, March 4, 1939.

Gallagher, Wirin & Johnson, Attorneys for Appellant. A. L. Wirin, of Counsel.

[fol. 100] Due and sufficient service of a copy of the attached document is accepted this 6th day of March, 1939.

Dated at Los Angeles this 6th day of March, 1939.

Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney; John L. Bland, Deputy City Attorney, by John L. Bland, Attorneys for Appellee, The People of the State of California.

[fol. 101] [File endorsement omitted.]

Endorsed on cover: In forma pauperis. File No. 43,200. California, Appellate Department, Superior Court. Term No. 715. Kim Young, Appellant, vs. The People of the State of California. Filed March 1, 1939. Term No. 715, O. T., 1938.

MAR 1 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 715 13

KIM YOUNG,

*Appellant,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR  
COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

OSMOND K. FRAENKEL,

A. L. WIRIN,

*Counsel for Appellant.*

LEO GALLAGHER,

GROVER JOHNSON,

*Of Counsel.*

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1938**

---

**No. 715**

---

**KIM YOUNG,**

*vs.*

*Appellant,*

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

*Appellee.*

---

**STATEMENT AS TO JURISDICTION.**

---

Pursuant to Rule 12-(1) of the Rules of this Court, appellant submits this statement showing that the appeal in the above entitled cause is properly before this Court.

**OPINION BELOW.**

The opinion of the Appellate Department of the Superior Court of Los Angeles County, State of California, is reported in 3 Cal. App. Supp. 62, 85 Pac. (2d) 231.

**A. JURISDICTION.**

**(1) Statutory Provisions Sustaining Jurisdiction.**

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928.

## (2) State Statute Drawn Into Question and Decision in Favor of Its Validity.

The appellant contended in the courts below that the Municipal Code of the City of Los Angeles, Section 28.00 and 28.01 thereof (Los Angeles Municipal Ordinance No. 77,000, Ch. 2, Art. 8, reported in Municipal Code of the City of Los Angeles, 1936 Ed., p. 115) was repugnant to the Constitution of the United States in that, on its face and as applied to the appellant said ordinance deprives the appellant of due process of law and of freedom of speech and freedom of the press, as guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The decision of the court below was in favor of its validity.

Said sections of said municipal ordinance provide:

### "SEC. 28.00. Definitions.

For the purpose of this Article, the following words and phrases are defined, and shall be construed as hereinafter set out, unless it shall be apparent from the context that they have a different meaning . . .

'Hand-Bill' shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public.

### SEC. 28.01. Hand-Bills—Distribution.

No person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to, or upon any automobile or other vehicle."

A municipal ordinance is a "State Statute" within the meaning of Section 237 (a) of the Judicial Code, *Lovell v. City of Griffin*, 303 U. S. 444.

### **(3) Finality of Judgment.**

The judgment forming the basis of the appeal is final both in form and in substance and disposes of all the elements of the controversy in the court below.

### **(4) Appeal Timely Taken.**

The order and judgment from which this appeal is taken was entered on December 9, 1938. (On December 14, 1938, the petitioner, within the time limit fixed by the Rules of the Appellate Department of the Superior Court, filed his petition for rehearing. On the same day the Appellate Department of said Superior Court denied said petition for rehearing). On the 20th day of February, 1939, the appellant filed with said Appellate Department of said Superior Court his petition for appeal accompanied by his assignment of errors and the within "Statement as to Jurisdiction." On said date Honorable Hartley Shaw, as Presiding Judge of said Appellate Department, made and entered an order allowing the within appeal to the Supreme Court of the United States.

### **(5) Judgment of the Highest Court.**

The judgment of the Appellate Department of the Superior Court of Los Angeles County, State of California, is that of the highest court in which, under the laws of the State of California, such judgment could be had in the case.

This case originated as a criminal prosecution against the appellant in the Municipal Court of the City of Los Angeles. Pursuant to Section 11 of the Municipal Code of Los Angeles a violation of Section 28.01 of the aforesaid ordinance constituted a misdemeanor.

Under the provisions of Section 1462 of the Penal Code of the State of California jurisdiction for the prosecution of misdemeanors is lodged in the Municipal Courts of the

respective municipalities. Under Section 1466 of said law, an appeal from the Municipal Court lies to the Superior Court.

The California courts have ruled that no appeal or review will lie from a decision by the Superior Court reviewing a decision of a Municipal Court: *Berg v. Traeger*, 210 Cal. 323; *Herbold v. Atchison, Topeka & Santa Fe R. R.*, 117 Cal. App. 430; *Berkeley v. Cunningham*, 218 Cal. 714; *Dungan v. Clark*, 159 Cal. 33; *McLean v. Freiburger*, 215 Cal. 1.

#### (6) Constitutional Questions Timely and Sufficiently Raised.

The claim that the Los Angeles Municipal hand-bill ordinance offends against constitutional liberty and denies freedom of speech and freedom of the press, under the Fourteenth Amendment to the Constitution of the United States, was asserted frequently and consistently in the courts below.

It was first urged and sustained by the first trial judge, who, on his own oral motion, adjudged the ordinance unconstitutional because of the decision of this Court in *Lovell v. Griffith*, *supra*.

From the order of the trial judge dismissing the criminal complaint against the appellant, "The People of the State of California" filed an appeal, as was the right of the prosecution under California procedure, to the Appellate Department of the Superior Court.

The Appellate Court reversed the order of the Municipal Court dismissing the proceedings, and remanded the case to the trial court for further proceedings. A copy of its opinion is hereto annexed and marked Exhibit "A". Because the order of the Appellate Department was not, at that stage of the proceedings, a "final judgment" so as to permit an appeal to this Court, no appeal was taken or

sought by the appellant, and the case was retried in the Municipal Court—this time resulting in a conviction.

In the course of the proceedings before the trial court, the appellant objected, prior to the introduction of any evidence, that the ordinance on its face and as applied to the appellant "was unconstitutional and void and of no force and effect on the ground that it constitutes a denial of freedom of speech and freedom of the press as guaranteed to the defendant by the due process clause of the Fourteenth Amendment to the Constitution of the United States" (R. 3). The trial judge overruled this objection (R. 4). A motion for a new trial was made at the end of the case based upon the same constitutional claim (R. 4) and likewise overruled (R. 5).

The appellant appealed from the judgment and sentence of the Municipal Court to the Appellate Department raising the same Federal constitutional issues (R. 5).

The court below, after expressly considering these constitutional objections, rejected them and upheld the ordinance (R. 10). The second opinion of the court is attached hereto and marked Exhibit "B".

In his petition for a rehearing, filed timely with the Appellate Department, as permitted by the rules of said court, the appellant urged that the decision and judgment of the Appellate Court of itself deprived him of freedom of speech and of the press under the Fourteenth Amendment to the Constitution of the United States. The court denied the petition for rehearing without opinion (R. 24).

#### (7) The Nature of the Case.

The facts in the case are not, and never have been, in dispute. That the appellant violated the ordinance is not denied; at the time of his arrest the defendant was engaged in the distribution of cards  $3\frac{1}{2} \times 5\frac{1}{2}$  inches in size;

some of them he had already given to pedestrians on the sidewalk adjacent to the Shrine Auditorium in Los Angeles and it was stipulated "he was proceeding to distribute the rest to other persons on the sidewalk" (R. 4). The cards which appellant was distributing bore the message:

"Back from  
 WAR-TORN SPAIN  
 Capt.  
 HANS AMLIE  
 Commander Lincoln Battalion  
 Brother of Congressman Amlie  
 JAY ALLEN  
 War Correspondent Expelled from  
 Rebel Spain.  
 PILÓE ARCOS  
 Spanish Actress and Singer  
 Chairman, LILLIAN HELLMAN  
 Screen Writer and playwright  
 TRINITY AUDITORIUM  
 847 So. Grand Ave.  
 March 21 —:— 8:00 P. M.  
 Admission . . . 25¢ and 50¢  
 AUSPICES: FRIENDS  
 LINCOLN BRIGADE  
 33 W. 2nd St. MI 7926  
 Mercury Printing Co.  
 855 N. Western Ave."

(There was no proof that any street littering resulted from the distribution by defendant (R. 4)).

For this act of distribution, announcing a public meeting in an auditorium in the City of Los Angeles, with respect to a matter of great current interest and grave public concern, the defendant, at the second trial in the Municipal Court, was convicted, fined \$25.00, and, in the alternative sentenced to five days in the city jail (R. 94).

**B. THE FEDERAL CONSTITUTIONAL QUESTIONS INVOLVED ARE IMPORTANT AND SUBSTANTIAL.**

**(a) Appellant Has Been Denied the Right to Freedom of Speech and of the Press.**

The question involved in this case is whether or not a municipality may forbid the distribution of leaflets on its streets. Although the ordinance has been upheld on the theory that it is aimed at littering of the streets, it was not charged or proved that defendant himself littered the streets, nor indeed that any of the persons to whom leaflets were distributed littered the streets (R. 11).

Appellant contends that this decision is contrary to the decision of this Court in *Lovell v. Griffin, supra*, and likewise contrary to decisions of various State courts construing similar ordinances, including one of the co-ordinate Appellate Departments of the Superior Court in the State of California itself. On the other hand, other State courts have reached the same conclusion as did the court below in the case at bar and appeals in two of such decisions are now being taken to this Court.

It is apparent, therefore, that a decision by this Court is essential to settle the important and fundamental question here involved.

This Court will remember that in the *Griffin* case it held void an ordinance which required a permit for the distribution of literature on the ground that such ordinance was an improper restriction on freedom of speech and of the press. In that case the Chief Justice pointed out that the ordinance was not limited to literature that was obscene or offensive to public morals or that advocated unlawful conduct, and that it was not limited to distribution inconsistent with the maintenance of public order or involving disorderly conduct or the misuse or littering of the streets.

The ordinance in the case at bar, like that in the *Griffin* case, was not limited in any of the respects suggested by the Chief Justice. Indeed it goes beyond the ordinance condemned in the *Griffin* case because it constitutes an absolute prohibition of distribution, whereas the *Griffin* ordinance at least contemplated possible distribution by permission of the city manager. The only respect in which the court below suggested any difference between the two ordinances related to the places in which distribution was prohibited. The *Griffin* ordinance prohibited distribution on any street, sidewalk or park, or to any person in a street-car and also prohibited the placing of leaflets in an automobile or other vehicle.

The court below stressed this difference on the ground that the places selected in the Los Angeles ordinance were connected with the public welfare. The court was apparently of the opinion that the city council might determine that such prohibition was necessitated "by the evils which lack of restraint would bring about." The only evil intimated in the opinion is that street littering might result from the indiscriminate distribution of hand-bills.

We submit that the court below misapplied the applicable constitutional principle. Freedom of speech and of the press, being fundamental to the existence of any democratic government, may be restricted only where there is a clear and present danger that such restriction is necessary to prevent serious harm to the State. *Schenk v. United States*, 249 U. S. 52; *Herndon v. Lowry*, 301 U. S. 242.

Although it is acknowledged that the public streets and sidewalks are designed primarily for vehicular and pedestrian traffic, a secondary use has been recognized for many years—for the expression of opinion, unaccompanied by some immediate evil. Courts concerned with freedom of

thought, speech and assembly have upheld the right of the people to use the public streets and parks to hold meetings and to conduct parades, in the absence of riot, disturbance or traffic interference. Similarly from time immemorial, Americans have not only resorted to the publication and general distribution of pamphlets expressing their opinions on public issues, but have circulated such publications on the streets and in public places, as part of the exercise by them of what they have deemed to be freedom of speech and freedom of the press.

It surely cannot be urged that the need of the public for clean streets is so great or important that total restriction of leaflet distribution, as attempted by the ordinance here in question, may be permitted. Other appropriate means for the effectuation of the municipal purposes are readily available. Receptacles can be provided at slight cost in which waste matter can be deposited. Ordinances can be enacted which punish littering, but do not punish the distribution of leaflets.

Even before the decision of this Court in the *Lovell* case ordinances, substantially identical with the one now before this Court, were held invalid as interference with freedom of speech or limited to commercial matter only. In all these cases the ordinance was restricted to street distribution, yet it never was suggested that its validity could be sustained on that narrow ground. *People v. Armstrong*, 73 Mich. 288; *Chicago v. Schultz*, 341 Ill. 208; *Coughlin v. Sullivan*, 100 N. J. L. 42; *Dearborn Publishing Company v. Fitzgerald*, 271 Fed. 479. All of these cases were cited by this Court with approval in the *Lovell* case.

In the recent case of *C. I. O. v. Hague*, 25 F. Supp. 127, No. 651, October Term, 1938, Judge Clark considered the *Lovell* case controlling as to a section of the Jersey City ordinance which banned distribution on streets and public places. He

indicated the fallacy of the argument advanced in the instant case in the court below, saying at page 143:

"The strategy is the use of ordinances designed and phrased to protect the streets against being littered with the consequent clogging of sewers, fire and disease hazards and the traditional frightening of horses. *People v. Armstrong*, 1888, 73 Mich. 288, 294, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578; *Wettengel v. City of Denver*, 1895, 20 Colo. 552, 39 P. 343; *Anderson v. State*, 1903, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421, for the purpose of protecting the minds of the people who walk those streets against being littered with certain kinds of ideas and again traditionally perhaps, being frightened. One might suggest the availability of street cleaning departments or refuse receptacles and some courts have even declared these ordinances invalid on the ground of unreasonableness. *Dillon, Municipal Corp.*, 5th Ed. § 589; *People v. Armstrong*, above cited; *City of Chicago v. Schultz*, 341 Ill. 208, 173 N. E. 276. Furthermore as the purpose is to prevent 'casting away' or 'throwing to the wind' there is a distinction between non-commercial and commercial (advertising) matter, the American tradition being to overcome sales resistance forcibly. *City of Philadelphia v. Brabender*, 201 Pa. 574, 51 A. 374, 58 L. R. A. 220; *Wettengel v. City of Denver*, above cited; *Coughlin v. Sullivan*, 100 N. J. L. 42, 126 A. 177. However that may be, it is unnecessary to elaborate the point of view of the Supreme Court's treatment of an identical ordinance of a Southern City."

This decision was affirmed by the Circuit Court of Appeals for the Third Circuit on appeal in an opinion not yet reported.<sup>1</sup>

<sup>1</sup> See also *Ex Parte Pierce*, 127 Tex. 35, 75 S. W. (2) 264; *People v. Johnson*, 117 N. Y. Misc. 133; *People ex rel. Gordon v. McDermitt*, 169 Misc. (N. Y.) 743; *New Rochelle v. McCormick*, Westchester L. J., June 19, 1935, p. 997; *Cox v. Edgewater*, 60 N. J. L. J. 328 (1937); *People v. Toth*, Oct. 1933, II, I. J. A. Bull. p. 2; *City of Johnston v. Spencer*, VI, I. J. A. Bull. 714 (1937); *City of Newark v. Hill*, I, I. J. A. Bull. p. 2; *People v. Gorin*, IV, I. J. A. Bull. p. 2.

In *People v. Taylor*, 3 Cal. App. Supp. 70, 85 P. (2) 978, the Appellate Department of the Superior Court of California for the County of San Diego, affirmed a dismissal of a charge based on an ordinance of the City of San Diego which prohibits the distribution of leaflets upon any street, park or public place. In that case the leaflet was a commercial one advertising a theatre. Nevertheless, the Court, relying upon the *Lovell* case and many of the other cases hereinabove referred to, held that an attempt to prohibit the handing of leaflets to persons on the streets or in public places was a violation of freedom of speech and of the press as guaranteed by the United States Constitution and also by the State Constitution.

Since, under California law, both the court below (the Appellate Department of the Superior Court of Los Angeles County) and the Appellate Department of the Superior Court of San Diego County are each courts of last resort, and no appeal or review to any higher California court lies from their decisions, in the instant and Taylor cases, respectively, the Federal Constitution, unless there is a determination of the conflict by this Court, means one thing in San Diego County, California, and another in Los Angeles County, California. In Los Angeles, one may be punished up to six months and a fine of \$500.00<sup>2</sup> for doing that which constitutes the exercise of a constitutional right in San Diego.

Further, the Supreme Court of Wisconsin in *City of Milwaukee v. Snyder* (No. 749, October Term, 1938), not yet reported, affirmed a conviction for the distribution of a strike leaflet on the ground that the ordinance was valid as a littering ordinance. A like conclusion was arrived at by the Supreme Judicial Court in Massachusetts in *Commonwealth v. Nichols*, 1938 Mass Advance, 1969; 18 N. E. (2) 166, No.

<sup>2</sup> L. A. Municipal Code, Section 11 (m).

849, October Term, 1938. These cases are being appealed to this Court.

In San Francisco a conviction for distributing circulars protesting the high price of milk was sustained by the Appellate Department of the Superior Court of San Francisco County under an ordinance substantially like the one in the case at bar. (*People v. Jones*, not reported).<sup>3</sup>

While many courts have brought meaning and reality to "freedom of the press" for political, racial and social minorities, by following the mandate and applying the spirit of the unanimous court in the *Lovell* case, and have wholeheartedly protected the right to disseminate political views through the circulation of leaflets and pamphlets, other courts throughout the United States have studiously evaded or completely emasculated the opinion of this Court. They have recognized it in lip service, only to nullify it in practical application. Thus, although many trial courts have accepted the *Lovell* decision as binding and determinative, appellate courts have disagreed. Prior to the decisions of the Superior Court below in the instant case, the judges of the municipal court uniformly ruled the Los Angeles ordinance unconstitutional under the authority of the decision of this Court in the *Lovell* case.<sup>4</sup>

Judges in New York City; Watertown, Massachusetts; Camden, New Jersey; Stratford, Connecticut; Peekskill, New York; and Chicago, Illinois, have passed upon municipal ordinances similar to the Los Angeles legislation, but have not recognized the distinction between the ordinances before them and the *Griffin* ordinance as sufficient to uphold such legislation. They have adjudged such ordinances unconstitutional as offending constitutional liberty. Other judges in Chicago, Illinois; Long Island City, New York;

<sup>3</sup> 7 International Juridical Association Bulletin 31.

<sup>4</sup> Los Angeles News, July, 1938, Supplement.

Bridgeport and Bristol, Connecticut, have taken a different view of the meaning and effect of the decision of this Court in the *Lovell* case, and have continued to sanction persecution of political radicals, labor leaders and strikers, and religious zealots, whose sole offense consisted of the circulation in city streets of circulars, leaflets and pamphlets expressing their points of view upon current and urgent political, labor and religious issues.<sup>5</sup>

If Alma Lovell, religious zealot, bent upon bringing Heaven on earth, by circulating religious tracts in the City of Griffin, had a constitutional right so to do, we believe that Kim Young, Korean student, concerned with saving Loyalist Spain and the world from Fascist terror, had the right to circulate cards on the streets of the City of Los Angeles, announcing a public meeting for the discussion of that vital issue.

**(b) Appellant Has Been Denied Due Process of Law.**

It is appellant's contention that he has been convicted for doing an act wholly innocent. The only theory upon which the ordinance was sustained by the court below was that it was aimed at street littering. Yet there was no evidence whatever that any littering resulted from the distribution on which this conviction rests (R. 11):

This Court has on numerous occasions reversed convictions where the act charged against a defendant was a wholly innocent one. Thus in *Fisk v. Kansas*, 274 U. S. 380, this Court reversed a conviction on the ground that the evidence failed to show that any unlawful acts were advocated by the organization which defendant was charged with assisting. In *Stromberg v. California*, 283 U. S. 360, it reversed a conviction for displaying a red flag because the law

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<sup>5</sup> Reported and commented upon in 7 International Juridical Association Bulletin 31.

punished such display "in hostility" to government without specifying that such hostility must be shown by unlawful means. In *deJonge v. Oregon*, 299 U. S. 353, this Court reversed a conviction because it rested solely on the auspices under which defendant spoke, not on the ground that he said or did anything unlawful.

So in the case at bar appellant has been convicted for the mere distribution of a leaflet without any contention that the contents of the leaflet were unlawful or that the leaflet was distributed in an unlawful manner.

### Conclusion.

WHEREFORE it is respectfully submitted that the appellant in the above entitled cause comes within the proper jurisdiction of this Court.

OSMOND K. FRAENKEL,

A. L. WIRIN,

*Counsel for Appellant.*

OSMOND K. FRAENKEL,

LEO GALLAGHER,

A. L. WIRIN,

GROVER JOHNSON,

GALLAGHER, WIRIN & JOHNSON,

*Of Counsel.*

**EXHIBIT "A".**

IN THE APPELLATE DEPARTMENT OF THE  
SUPERIOR COURT, COUNTY OF LOS ANGELES,  
STATE OF CALIFORNIA.

Superior Court No. CR A 1511

Trial Court No. 82837.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and*  
*Appellant,*

*vs.*

KIM YOUNG, *Defendant and Respondent.*

**Memorandum Opinion.**

Appeal by plaintiff from order dismissing complaint of the Municipal Court of the City of Los Angeles, Joseph L. Call, Judge. Reversed.

The question presented by the action of the trial judge in dismissing the complaint before the trial was entered upon is the validity of section 28.01 of the Los Angeles Municipal Code under which defendant is charged. That section provides: "No person shall distribute any handbill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any handbill to, in or upon any automobile or other vehicle." Section 28.00 of the same code contains a definition of "handbill" which is made applicable to section 28.01 and is in these words: "Handbill shall mean any handbill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public." These provisions are substantially the same as a former ordinance of the City of Los Angeles, except that the former ordinance contained no definition of the term "handbill" and extended its prohibition to cover "any handbill, dodger or notice of advertisement."

The validity of this former ordinance was attacked in this court in *People v. White*, (1935) Cr. A. 1255, and in upholding it this court there said: "Appellants argue that the ordinance contravenes the constitutional guaranties of free speech and free press, and is therefore void. With this argument we cannot agree. The rights mentioned are within the liberty safeguarded by the due process clause of the Fourteenth Amendment, but they are not absolute. *Near v. Minnesota*, 283 U. S. 697, 707-8; *Whitney v. California*, 274 U. S. 357, 371; *Gitlow v. New York*, 268 U. S. 652, 667. They are subject to the police power, in the exercise of which reasonable regulations as to the time, place and contents of speech or printing may be made. 12 Corpus Juris 952, sec. 468, 954 sec. 479. Under this power reasonable regulations of the use of public streets and places may be made, including those which, like the one before us, are intended to prevent the littering of such streets and places with waste material, and such regulations are valid even though they may incidentally affect the exercise of some right otherwise guaranteed by the constitution. *In re Anderson*, 69 Neb. 686, 689; 96 N. W. 149, 150; 5 Ann. Cas. 421; *Milwaukee v. Kassen*, 203 Wis. 383, 234 N. W. 352; *People v. St. John*, 108 Cal. App. (Supp.) 779; see also note 22 A. L. R. 1485. There are decisions to the contrary, relating to quite similar ordinances, but those above cited appeal to us as better grounded in reason. Some of the contrary decisions were made in states where the powers of municipal corporations depend on grants from the legislature, and were based in part on the rule that such grants are to be strictly construed. Such decisions can have little weight in this state, where sec. 11, Art. XI, of the Constitution authorizes each municipal corporation to exercise, within its limits and subject to general laws, the entire police power of the state (*In re Maas*, 219 Cal. 422, 425), and where the strong presumption in favor of the validity of legislative action applies to city ordinances. *People v. St. John*, *supra*; *Jardine v. Pasadena*, 199 Cal. 64, 72. We upheld the particular ordinance now under consideration in *People v. Kay*, Cr. A. 1177; *People v. Horiuchi*, Cr. A. 358; *People v. Silverman*, Cr. A. 227, and *People v. Shapiro*, Cr. A. 248,

against the same attack which is now made on it, and we see no reason to doubt the correctness of those decisions."

*People v. White, supra*, also held that the prohibition of the former ordinance was not limited to commercial handbills, etc. but extended to those of a political or religious nature. A similar ordinance was given a like interpretation in *Commonwealth v. Kimball*, (Mass. 1938) 13 N. E. (2d) 18, 114 A. L. R. 1440, 1443. This holding is fully applicable to the present ordinance. Hence it covers the handbills here in question, even if, as defendant contends, they are of a political nature.

We see no reason for receding from the decision in *People v. White*, and upon it the validity of the present ordinance must be affirmed. In support of it see *Commonwealth v. Kimball, supra*, 13 N. E. (2d) 18, 114 A. L. R. 1440, 1444, and cases cited in note p. 1447; *Sieroty v. City of Huntington Park*, (1931) 111 Cal. App. 377. The definition of the term "handbill" contained in the present ordinance does not materially alter the case. As stated in the foregoing quotation, there are decisions to the contrary, which we there declined to follow. It is earnestly urged upon us that our decision there is contrary to that lately made by the Supreme Court of the United States in *Lovell v. Griffin*, (1938) 82 Law ed. Adv. Opin. 660, and that this decision expressly approves those which we declined to follow. The ordinance condemned in the decision just cited as an infringement of the freedom of the press was one which forbade the distribution of circulars, etc. without a written permit, at any time or anywhere. It did not purport to be a regulation of the use of the streets. The court said regarding it: "There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." (Emphasis ours.) This language differentiates the ordinance there in question from that now before us, which is intended to prevent misuse and littering of the streets. In another case lately decided by the Supreme Court, *Senn v. Tile Layers Prot. Union*, (1937) 301 U. S. 468, 478, 81 L. ed: 1229, 1236, where

a state law authorizing the use of streets for picketing in labor disputes was upheld, the court said, "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The state may, in the exercise of its police power regulate the methods and means of publicity *as well as the use of public streets.*" (Emphasis ours.) This statement indicates that the court has not departed from the rule that the right of free speech is subject to police regulation relating to the use of public streets for that purpose.

It is argued that the ordinance cannot be regarded as one to prevent littering of the streets because its prohibition is not directed at the persons who drop handbills on the streets. But in order effectually to prevent the accomplishment of something regarded as an evil, it is often necessary to aim a prohibition at some act farther back in the chain of events than the last one which completes or brings about the result to be avoided. An illustration of this may be found in the prohibition laws. There the actual evil to be suppressed was the drinking of intoxicating liquor, or, according to the view of some, only its use to excess, but to accomplish this it was deemed necessary and proper to prohibit the manufacture, sale, transportation and possession of such liquor—acts which were in themselves harmless except as they facilitated the drinking of the liquor. The legislature may also frame its enactments upon a consideration of the ordinary tendencies and reactions of human nature. It needs but little observation of crowds of persons in the presence of passers of handbills to know that many persons entirely uninterested in a handbill will passively accept it and then at once, either with or without examination of it, drop it wherever they may be. The enforcement of a law against their doing so would in a crowd be practically impossible, merely from the number of persons involved. The number of distributors of handbills to such a crowd would, however, in most cases be small enough so that it would be possible for law enforcement officers to deal with them. Even in case of ordinary street traffic there would be the same sort of disparity of numbers, though not to such an extreme degree. The case

is in this respect within the rule of *Purity Extract & T. Co. v. Lynch*, 1912) 226 U. S. 192, 201, 57 L. ed. 184, 187.

As to the decisions which, it is claimed, are followed and approved in *Lovell v. Griffin, supra*, (1928) 82 Law ed. Adv. Opin. 660, we do not find them mentioned at all in the body of the opinion. After the statement "What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty (of the press) from every sort of infringement need not be repeated," appears a list of decisions of the Supreme Court, followed by a reference to a marginal note. This note begins with "See also" some cases cited, and then proceeds with "Compare" two of the cases relied on by appellants. One of the cases cited in the first part of this note, beginning with "See also," *Coughlin v. Sullivan*, (1924) 100 N. J. L. 42, 126 A. 177, declares that an ordinance such as we have here is valid, for the reasons above stated, at least as to handbills, etc., advertising commercial or business enterprises, but holds it unreasonable as to pamphlets relating to municipal affairs of the city where they are distributed. The mere reference in the note for comparison is not necessarily an approval of the cases so referred to.

The judgment of dismissal is reversed and the cause [fol. 53] remanded to the Municipal Court for further proceedings.

SHAW,  
Presiding Judge.

I concur. While ordinarily we would have promptly reversed this judgment, because it is contrary to our repeated decisions, the desire to review anew the problem presented, because of its great importance, has caused delay until that review could be accomplished. A fresh consideration of the principles involved has left me convinced that the ordinance provisions involved in this case are not unconstitutional.

We must not lose sight of the fact that we judges are not the framers of the laws; legislative bodies, composed of men sworn as solemnly as we to uphold the Constitution,

are charged with the responsibility of determining what policies shall be enacted into ordinances. It is only when it appears without reasonable doubt that an ordinance is in conflict with a provision of our State or Federal Constitution that it falls within our right, and hence becomes our duty, to declare the ordinance inoperative.

If the ordinance in question is unconstitutional it is not because it is prohibited by the First Amendment to the Federal Constitution, for that is obviously inapplicable, but because it runs counter either to Article I, sec. 9 of our Constitution, which provided that "no law shall be passed [fol. 54] to restrain or abridge the liberty of speech or of the press;" or to the Fourteenth Amendment to the Federal Constitution. The vital importance of this right, implicit in the "liberty" which the Fourteenth Amendment protects against possible state attack, must not blind us to the fact that it is not an absolute right. Surely no one would claim that the right to advocate the recall of a public official is so compelling that one may not be denied the privilege of expressing one's views on the subject by painting them in bold letters on the city hall tower, or on the sidewalks of the city streets. A statute prohibiting the use of public buildings and public sidewalks as pages upon which to exercise the liberty of freely publishing one's ideas would clearly be upheld, a limitation though it be on a constitutional right. A statute prohibiting the use of the streets for the transportation of handbills, circulars, or similar publications, would as clearly be condemned as an unwarranted limitation.

Between these two extremes there lies a field wherein reasonable minds may honestly differ, and there is where I find this ordinance in question. Were I as councilman, it is quite likely that I should conclude that, while there was a "clear and present danger" that the free distribution of handbills on public sidewalks and in street cars would be a public nuisance, resulting in littered streets, clogged storm drains, fire hazards and annoyance to passersby, the general [fol. 55] public advantages of keeping open this avenue of the exchange of ideas outweighed the disadvantages of

spending public funds to keep the streets open. But the conclusion that an expense would be necessitated by the unchecked distribution of dodgers on the streets and that the public should be spared the expense, is a conclusion which may reasonably be made by the legislative body which is faced with its consideration. It is not for us to substitute our judgment of what is the sounder public policy for the opinion of the city council.

BISHOP,  
Judge.

I concur. The ordinance condemned by the Supreme Court in *Lovell v. Griffin*, (1938) 82 Law. ed. Advance Opinions 660) was not in any sense a regulation of the use of public streets or places, or private property; it was, as the court makes manifest in its opinion (p. 662), an absolute prohibition of "the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager." Such prohibition was obviously obnoxious to the vital American principle of freedom of the press. But we have no such ordinance or question before us; we have merely a police regulation applicable to persons in their use of the public streets and parks, their conduct on street cars and with respect to other vehicles. Such regulations have been repeatedly upheld as is evidenced by the authorities cited in the memorandum opinion of Presiding Judge Shaw, which authorities are in no way impugned by the above cited opinion in *Lovell v. Griffin*.

It is not a material question on this appeal, but were it so, I think we would not interpret the language of the Los Angeles ordinance forbidding any person to "throw, place or attach any handbill to, in or upon any automobile or other vehicle" as prohibiting the placing of handbills for transportation or other lawful purpose in a vehicle possessed by such person himself.

SCHAUER,  
Judge.

Date July 29, 1938.

**EXHIBIT "B".****IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA**

Superior Court No. CR A 1547.

Trial Court No. 82837.

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,**vs.*KIM YOUNG, *Defendant and Appellant.***Opinion.**

Appeal by defendant from a judgment of the Municipal Court of the City of Los Angeles, of conviction of violation of section 28.01 of the Los Angeles Municipal Code. A. E. Paonessa, Judge. Affirmed.

For Appellant: A. L. Wirin.

For Respondent: Ray L. Chesbro, City Attorney, W. Jos. McFarland, Assistant City Attorney and John L. Bland, Deputy City Attorney.

The provisions of the Municipal Code of the City of Los Angeles, which prohibit the distribution of handbills to pedestrians on the sidewalks of the city, do not, under the authorities so infringe any constitutional right that they may be held inoperative. The judgment that the defendant-appellant pay a fine of \$25.00 for violating the ordinance is therefore to be affirmed.

The provisions of the Municipal Code which are involved appear in sections 28.00 and 28.01. There we find that "no person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to or upon any automobile or other vehicle" and by way of definition it is declared that "Handbill shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

It may at times be a close question of fact, whether a per-

son is actually "distributing" cards, which the municipal code prohibits, or whether he is passing out a card or two as an isolated casual or occasional act, which, under a proper interpretation of its provisions, the code does not prohibit. *Anderson v. State*, (1903) 69 Neb. 686, 689, 96 N. W. 149, 150, 5 Ann. Cas. 421; *Coughlin v. Sullivan*, (1924) 100 N. J. L. 42, 126 Atl. 177; *Milwaukee v. Kassen*, (1931) 203 Wis. 383, 234 N. W. 352, 354. In this case, however, it plainly appears that the defendant was engaged in the distribution of cards. He had in his possession over three hundred colored cards, three and a half by five and a half inches in size; some of these he had already given to pedestrians on the sidewalk adjacent to the Shrine Auditorium, and, it was stipulated, he was "proceeding to distribute" the rest to other persons on the sidewalk. Obviously, the defendant violated the provisions of the Municipal Code, as he was charged with doing, and the judgment imposing sentence upon him must be affirmed unless in some way the state or federal constitution is offended by those provisions.

The Municipal Code's endeavor to create a public offense is futile, it is claimed, because contrary to the right to speak and publish freely, safeguarded by Art. I, section 9, of our state constitution, and by the Fourteenth Amendment to the federal constitution. The language of the former is: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The Fourteenth Amendment does not in terms protect against an invasion of the right freely to speak and to publish, but in its fending against the deprivation of liberty without due process, the right is held to be fully guarded. *Lovell v. Griffin*, (1938) 82 Law ed. Adv. Op. 660, 58 Sup. Ct. 666, and cases cited.

The right to speak and to publish freely is not an absolute one, free from all legislative control. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic." *Schenck v. United States*, (1919) 249 U. S. 47, 63 L. ed. 470, 473. "That a state, in the exercise of its police power, may

punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." *Gillow v. New York*, (1925) 268 U. S. 652, 69 L. ed. 1138, 1146. Reasonable restrictions may be placed upon the time and place of the exercise of the right of free expression, as well as upon its content. In spite of the uncompromising language of our constitution, it was held in *In re Thomas*, (1909) 10 Cal. App. 375, that the city of Los Angeles could validly prohibit the making of a public speech in any public park or on any street, within a defined district. A similar ordinance of the city of Boston, prohibiting all public addresses, without a permit, in any of the public grounds of the city, was upheld by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Davis*, (1895) 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, the opinion being written by Mr. Justice Holmes, and it was thereafter held valid by the Supreme Court of the United States, in *Davis v. Commonwealth*, (1897) 167 U. S. 43, 42 L. ed. 71, 17 S. Ct. 731. The New York Court of Appeals held such a prohibitory ordinance to be constitutional in *People v. Atwell*, (1921) 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 107 (Mr. Justice Cardozo concurring specially) and again in *People v. Smith*, (1934) 263 N. Y. 255, 188 N. E. 745. Still other cases, in accord, are reviewed in *Coughlin v. Chicago Park Dist.*, (1936) 364 Ill. 90, 4 N. E. (2d) 1, itself reaching the same conclusion. While it may be said, as it was in the case of *People v. Smith*, *Supra*, that an ordinance such as we have just been considering "is not aimed at free speech," it is plain that it nevertheless hits it. An ordinance which declares that one may not speak within a defined district, to that extent abridges the right to speak freely. Although there is an abridgement, the ordinance may still be valid, if the abridgement is not the end sought by the ordinance, but is merely incidental to the operation of the means reasonably adopted to attain a lawful end. Such is the witness of the cases.

We do not subscribe to the doctrine that the city council could prohibit the distribution of handbills on the city streets in the absence of any public interest to be served by the prohibition, just because the streets are "city" streets,

under the council's charge; we hold that no restraint may validly be placed by public authority upon the constitutional right of free expression, whether it be to speak, pen, or print, even upon the public streets, which is not justified by the evils which lack of restraint would bring about. We may not, however, substitute our judgment for the city council's in determining how far, within the extreme limits of reason, the threatened evils require restrictions on the exercise of a constitutional right. It is only when we can say that clearly the line of reasonable debate has been passed that we have the right to declare invalid the deliberate act of the legislative body of the city.

Looking at the code before us, we cannot say that the city council had no reasonable cause for prohibiting the distribution of handbills on the sidewalks of the city, or that the city council acted arbitrarily in determining that some measure other than, or short of, such prohibition would not meet the needs reasonably well. Experience teaches that the immediate result of the indiscriminate distribution of handbills on public streets is the littering of those streets. Curiosity and courtesy would induce most persons to take one of the cards offered by appellant; a glance, and lack of further interest, would release it from the hand. Those who are charged by law with determining the public policy which shall govern, may well have seen the problem as it was stated in *Anderson v. State*, *supra*, 69 Neb. 686, 96 N. W. 149, 150, 5 Ann. Cas. 241, as quoted in *City of Milwaukee v. Kassen*, (1931) 203 Wis. 383, 234 N. W. 352, 353: "The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the streets in a unclean and filthy condition." The evil against which the code appears to have been directed is to be measured not merely by appellant's three hundred cards, but by the flood which might reasonably be expected if the code ceased to operate as a dike.

It has been argued that the remedy for littered streets is not to prohibit the distribution of handbills, but to en-

force the laws against letting them fall on the street or sidewalk. But in order effectually to prevent the accomplishment of something regarded as an evil, it is often found best, by those who determine the public policy, to prohibit an act, innocent in itself, but which is in the chain of events leading to the evil. Of laws founded on this principle our federal Supreme Court stated in *Purity Extract & T. Co. v. Lynch*, (1912) 226 U. S. 192, 57 L. ed. 184, 185: "It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of government. (Cases cited.) With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended."

Our conclusion that the individual's exercise of his constitutional right of free expression may be curbed by forbidding the distribution of handbills on public streets, finds support in the authorities. See *Anderson v. State*, *supra*, (1903) 69 Neb. 686, 96 N. W. 149; *City of Milwaukee v. Kassen*, *supra*, 203 Wis. 383, 234 N. W. 352; *Almassi v. City of Newark*, (N. J. Com. Pl.) (1930) 150 A. 217; *Commonwealth v. Kimball*, (1938) — Mass. —, 13 N. E. (2d) 18, 114 A. L. R. 1440. In support of principles on which, in part, our conclusion is based, we find *People v. St. John*, (1930) 108 Cal. App. 779, 288 P. 53; *Sieroty v. City of Huntington Park*, (1931) 111 Cal. App. 377; and *San Francisco Shopping News Co. v. City of South San Francisco*, (1934) 69 F. (2d) 879 (certiorari denied, 293 U. S. 606). There are authorities not in harmony with our conclusion, as may be discovered in the notes in 22 A. L. R. 1484 and 114 A. L. R. 1446. In connection with some of these cases, those that are based in part on a strict construction of legislative grants of power to municipalities, this should be noted respecting the police power of California cities: within their boundaries they exercise "the entire police power of the state, subject only to the control of general

laws." Sec. 11, Art. XI, State Constitution; *In re Mass*, (1933) 219 Cal. 422, 425.

Appellant earnestly urges that *Lovell v. Griffin, supra*, 82 Law ed. Adv. Op., 58 Sup. Ct. 666, is an authority requiring us to reverse this judgment. But we find nothing in the decision in that case to cause us to doubt the correctness of our conclusion. The ordinance under consideration there differs from ours in a vital particular appearing in the Supreme court's characterization of it: "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation either by hand or otherwise." There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager."

The distinction to which we refer is not, that under the Griffin City ordinance distribution of pamphlets would be possible were a permit obtained, while no permit is provided for under our ordinance. In effect the two ordinances are identical in this regard, for the supreme court looked upon the permit feature as a nullity; the ordinance with it, was measured as though it were without it. The circumstance that some of the ordinances prohibiting speaking in public parks and streets, permitted the speaking if a permit was obtained, was not made the basis of approving the ordinance in any of the cases we noted. The absence, in our ordinance, of any provision for a permit, neither strengthens it nor does it invalidate it.

The distinction between the Griffin city ordinance and the Los Angeles code which is both vital and obvious, is that the former prohibited the distribution of handbills and cards anywhere in the city, while the latter prohibits their distribution only in a very limited number of places, which cannot be said to be wholly unconnected with public welfare. The supreme court did not indulge in *obiter dictum*; that is, it did not say that an ordinance such as ours

would be valid or invalid. It did point out, however, that the ordinance which it determined denied due process, was distinguishable from an ordinance such as ours in the particular we have emphasized, and thus did not extend its disapproval to an ordinance guarding against the littering of streets, which our ordinance (code) does.

Up to this point we have considered the validity of the provisions of the municipal code in question solely from the standpoint of the attack made upon them that they are destructive of the right freely to express one's views. It may be, however, that the real constitutional right involved is that rescued from an ordinance such as ours by *In re Thornburg*, (1936) 55 Ohio App. 229, 9 N. E. (2d) 516, where it was held that as the right to engage in business is a property right, to prevent one from advertising his business, by passing out cards on the sidewalk, is to deprive one of his property without due process. The cards which appellant was distributing bore this message:

"Back from . . .

WAR TORN SPAIN

Captain

HANS AMLIE

Commander Lincoln Battalion

Brother of Congressman Amlie

JAY ALLEN

War correspondent Expelled from

Rebel Spain

PEPI JUNEDA

Famous Spanish Dancer

PILAR ARCOS

Spanish Actress and Singer

Chairman, LILLIAN HELLMAN

Screen writer and playwright

TRINITY AUDITORIUM

847 So. Grand Ave.

March 21—:—8:00 P. M.

Admission . . . 25c and 50c

AUSPICES FRIENDS LINCOLN BRIGADE

333 W. 2nd St.—:—Mi. 7926

Mercury Printing Co., 855 No. Western Ave."

Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views.

But if this be so, our conclusion is not thereby changed. We do not find the constitutional prohibition against deprivation of property without due process to be superior to that which protects one from being deprived of his liberty without due process; the latter is not, any more than the former, an absolute right; each may be abridged by a reasonable exercise of the police power for the public benefit. Indeed, if we had to choose, we should follow *Coughlin v. Sullivan, supra*, 100 N. J. L. 42, 126 A. 177, in finding it easier to uphold an ordinance forbidding the distribution of commercial handbills than one prohibiting the distribution of handbills intended to express one's views on questions of public concern.

For the foregoing reasons, we are of the opinion that the judgment of conviction should be, and it is, affirmed.

Dated December 9, 1938.

BISHOP,  
*Judge.*

We concur:

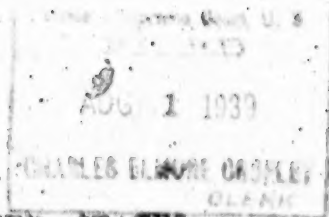
SHAW,  
*Presiding Judge.*  
SCHAUER,  
*Judge.*

Filed Feb. 20, 1939. L. E. Lampton, County Clerk, by  
J. B. Williams, Deputy.

(1206)



FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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No. 13

---

KIM YOUNG,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

---

APPEAL FROM THE SUPERIOR COURT, APPELLATE DEPARTMENT,  
STATE OF CALIFORNIA.

---

BRIEF FOR APPELLANT.

---

OSMOND K. FRAENKEL,

LEO GALLAGHER,

CAROL KING,

A. L. WIRIN,

*Counsel for Appellant.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

---

No. 13

---

KIM YOUNG,  
vs.

*Appellant,*

THE PEOPLE OF THE STATE OF CALIFORNIA.

---

**BRIEF FOR APPELLANT.**

---

**I. Opinion of the Court Below.**

The opinion below was reported in 3 Calif. App. Supp. 62, 85 P. 2nd 231.

**II. Jurisdiction.**

1. The statutory provision is Judicial Code Section 237-b as amended by the Acts of February 13, 1925 and March 8, 1934, U. S. C. Title 28 Section 344-b.

2. The date of the judgment is December 9, 1938, on which date the California Superior Court affirmed the conviction herein (R. 5). Timely application for rehearing was made and denied (R. 12, 13). The Superior Court is, in cases such as this, the highest state Court. (*McLean v. Freiburger*, 215 Calif. 1).

3. The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237-b, *supra*.

The claim of Federal constitutional right was specifically raised up at the trial by motion at the commencement of the trial (R. 2) and by motion for a new trial after conviction (R. 2). The Superior Court of the State in its opinion specifically passed upon the claim of Federal right and overruled the same (R. 5, ff.).

The Federal right claimed by appellant is that the ordinance under which he was convicted is, upon its face, as applied to him, unconstitutional in denying to him due process of law under the Fourteenth Amendment to the United States Constitution (R. 3). This claim is grounded upon the contention that appellant's right to freedom of speech and freedom of the press were violated by the prohibition of the distribution of handbills contained in said ordinance (Los Angeles Municipal Code § 28.01) and by the insufficiency of the charge upon which he was tried and the insufficiency of the evidence. The ordinance in question is as follows:

“§ 28.00. Definitions.

For the purpose of this Article, the following words and phrases are defined, and shall be construed as hereinafter set out, unless it shall be apparent from the context that they have a different meaning . . .

‘Hand-Bill’ shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public.

§ 28.01. Hand-Bills—Distribution.

No person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park,

or to passengers on any street car, or throw, place or attach any hand-bill in, to, or upon any automobile or other vehicle."

4. The following cases, among others, sustain the jurisdiction:

- ☛ *Lovell v. Griffin*, 303 U. S. 444;
- Hague v. C. I. O.*, 59 Sup. Ct. 954.

5. This Court noted probable jurisdiction on April 3, 1939.

### III. Statement of the Case.

Appellant was charged with having distributed a hand-bill in violation of the ordinance (R. 17). The hand-bill announced a meeting for discussion of the war in Spain (R. 4). There was no evidence that appellant had littered the streets or that anyone else had done so, the evidence only being that at the time the appellant was in the process of distributing about 300 of these hand-bills (R. 2).

Originally, appellant had been discharged on the ground that the ordinance was unconstitutional (R. 19) but upon an appeal by the City of Los Angeles, the Superior Court of Los Angeles County reached a contrary conclusion (R. 19), which resulted in a new trial and conviction (R. 20, 21) affirmed by the Superior Court on a second appeal (R. 22).

The Appellate Court upheld the ordinance on the ground that it was aimed at street littering and that, to accomplish such purpose, distribution could be punished (R. 8).

### POINT I.

**Appellant's conviction was without due process of law in violation of his right of freedom of speech and of the press.**

This Court having, in *Lovell v. Griffin*, 303 U. S. 444, ruled that the Fourteenth Amendment protects leaflet distribution, the question now arises whether such protection can

be destroyed under the pretext of preventing the littering of streets. That municipalities may punish street littering is, of course, not disputed. But in the case at bar the offense charged was not littering, but distribution. Respondent justifies the charge on the ground that littering might have resulted from the distribution. It is, however, not claimed that appellant himself littered the streets, or even that any of the persons who accepted the literature which appellant handed out, subsequently threw it away (see R. 2). There was no evidence of any littering at all.

The conviction, therefore, can be upheld only if a municipality may prohibit *all* distribution, an act harmless in itself, on the theory that in some instances harm may result from that act. It is submitted that this Court has, in *Stromberg v. California*, 283 U. S. 359, ruled otherwise. In that case a conviction for display of a red flag in "opposition" to government was reversed because the statute made no distinction between opposition manifested by lawful means or such opposition when manifested by unlawful ones. A similar view was expressed by Mr. Justice Roberts in *Herndon v. Lowry*, 301 U. S. 242 at page 259:

"And where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained."

So in the case at bar the statute punishes distribution unaccompanied by littering, as well as distribution which has such consequences.

It cannot, in this case, be argued that the State Court has, by its construction of the ordinance, limited its application to distribution actually accompanied by littering because there was no proof of littering. But it is argued that, since municipalities have the right to prevent littering, they may

prevent distribution on the theory that it results in littering (R. 8) and that the courts may not inquire whether the means used are appropriate or necessary. With this principle of judicial self-restraint (compare Mr. Justice Stone dissenting in *United States v. Butler*, 297 U. S. 1 at 78) counsel would be the last to disagree. But it is submitted that this principle has no application to the problem now before the Court.

For when the police power comes into conflict with the basic democratic rights of freedom of religion, press and assembly, the conflict must be resolved in different terms. See suggestion by Mr. Justice Stone in *United States v. Carolene Products Co.*, 304 U. S. 144, 152, note 4. This Court, in the *Lovell* case, recognized the importance in American life of the political pamphlet. In these troubled times the free distribution of varying points of view is of the utmost importance. There are many groups in the community, religious, political or economic, who are not able to command either the radio or the press for the distribution of their ideas. The only way that they can be heard is by the distribution of leaflets and pamphlets. Such distribution, in order to reach the general public, must be on the public streets. It is absurd to suppose that any effective circulation of minority opinion is possible in communities where ordinances of the kind now under review are permitted to operate. The contention that such ordinances are directed against littering and not against distribution is specious and should not receive the sanction of this Court. To stop littering no such drastic ordinance is needed.

To say that the courts may not consider the necessity for the restriction upon freedom of speech and of the press because of a claim that the police power has been exercised would result in the destruction of such basic rights. Therefore, restriction of these rights is permissible only when necessary to prevent serious evil to the state. That was

recognized in *Stromberg v. California*, *supra*, where the Court upheld part of the statute there under consideration because it punished incitement to the overthrow of organized government by unlawful means, and condemned another part because it was susceptible of the interpretation that it banned acts themselves entirely lawful.

In *De Jonge v. Oregon*, 299 U. S. 353, the Chief Justice said:

"These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

In *Herndon v. Lowry*, *supra*, this Court held unconstitutional a statute which punished an attempt to incite insurrection by persuasion because the utterances upon which the prosecution rested were themselves not unlawful. Mr. Justice Roberts, speaking for the majority of the Court, rejected the contention of the state in that case that utterances having a "dangerous tendency" could be punished. He said:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule

and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."

And applicable to this situation is also the statement of Mr. Justice Holmes in *Schenck v. United States*, 249 U. S. 47 at page 52:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

The *Lovell* case carried these views to their logical conclusion in condemning an ordinance which banned all leaflet distribution.

Even before the decision of this Court in the *Lovell* case there had been numerous decisions declaring unconstitutional similar ordinances. The earliest of these was *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275 (1889).

See to like effect *City of Chicago v. Schultz*, 341 Ill. 208, 173 N. E. 276 (1930); *Ex parte Pierce*, 127 Tex. Cr. 35, 75 S. W. 2nd 264 (1934); *In re Cox*, 122 N. J. L. 150 (1937); *New Rochelle v. McCormick*, Westchester L. J. June 11, 1935, p. 997.

See also various unreported cases, such as *City of Newark v. Hill*, 1 I. J. A. Bull. No. 12, p. 2; *People v. Toth*, 2 I. J. A. Bull. No. 5, p. 2; *People v. Goren*, 4 I. J. A. Bull. No. 3, p. 3. See also 5 I. J. A. Bull. p. 147.

Cf. *Star Company v. Brush*, 185 App. Div. 261, 172 N. Y. Supp. 851 (1918); *Dearborn Publishing Company v. Fitz-*

*gerald*, 271 F. 479 (1921); *In re Campbell*, 64 Calif. App. 300, 221 Pac. 952 (1923); *People v. Armentrout*, 118 Calif. App. 761, 1 P. 2nd 556 (1931).

In some cases the courts have limited the application of similar ordinances to commercial literature on the ground that any application of the ordinances to pamphlets generally would be an unconstitutional deprivation of free speech. See *People v. Johnson*, 117 Misc. 133, 191 N. Y. Supp. 750 (1921); *Coughlin v. Sullivan*, 100 N. J. L. 42, 162 A. 177 (1924).

Since the decision of this Court in the *Lovell* case, there have been decisions to like effect. In *C. I. O. v. Hague*, 25 F. Supp. 127, Judge Clark of the District Court of New Jersey considered that case controlling with regard to an ordinance of Jersey City which banned the distribution of leaflets on streets and public places. He recognized that ordinances having the broad sweep of the ordinance now before the Court are designed rather to restrict the circulation of ideas than to prevent the littering of streets, saying:

"The strategy is the use of ordinances designed and phrased to protect the streets against being littered with the consequent clogging of sewers, fire and disease hazards and the traditional frightening of horses, for the purpose of protecting the minds of the people who walk those streets against being littered with certain kinds of ideas and again, traditionally perhaps, being frightened."

In the Circuit Court of Appeals this portion of the decree of the District Court was unanimously upheld. Judge Biggs held the ordinance to be "squarely within the decision" of the *Lovell* case.

In this Court also the ordinance was held void on its face within the *Lovell* case (59 Sup. Ct. 954, 965). Indeed this Court struck out from the decree of the Court below

(see 101 F. 2d 774 at 795) provisions which so restricted the injunction that it would not be applicable where the leaflets were distributed in such a way as to cause littering of the streets.

In *People v. Taylor*, the Appellate Department of the Superior Court of California, for the County of San Diego (not yet reported), affirmed a dismissal of a charge based on an ordinance which, like the ordinance now before the Court, prohibits the distribution of leaflets upon any street, park or public place. See also *People ex rel. Gordon v. McDermott*, 169 Misc. 743; *People v. Gilione*, 3 L. R. R. 597; *People v. Finkelstein*, 4 L. R. R. 77. For other unreported cases see 7 I. J. A. Bull. No. 1, p. 4 (numbered 162 in error).

On the other hand, in addition to the case at bar, and the two other cases now before this Court, a contrary result was reached by the Appellate Department of the Superior Court of California in the case of *People v. Jones*. (See Los Angeles Daily Journal, August 9, 1938, and 7 I. J. A. Bull. p. 31; See also unreported cases cited in foot-note 15 on page 32).

These decisions rested in part on earlier decisions in the same jurisdictions, in part on an attempted distinction between the ordinances in question and the ordinance involved in the *Lovell* case. The earlier cases relied on are in the main inapplicable. Thus in the case at bar the Court relied upon *People v. St. John*, 108 Calif. App. 779, 288 Pac. 53; *Sieroty v. City of Huntington Park*, 111 Calif. App. 377, 295 Pac. 564; *San Francisco Shopping News Company v. City of South San Francisco*, 69 F. 2d 879, certiorari denied 293 U. S. 606, and *In re Anderson*, 69 Nebr. 686, 96 N. W. 149; in the *Snyder* case the Court relied on *Milwaukee v. Kassen*, 203 Wis. 383, 234 N. W. 352; in the *Nichols* case the Court relied on *Commonwealth v. Kimball*, 1938 Mass. Adv. 267, 13 N. E. 2d 18.

In the *Kassen* case the Court rested its conclusion largely on the *Anderson* case; besides appellant conceded the validity of the ordinance. In the *Kimball* case the constitutional issues were given scant consideration by the Court. In the *Sieroty* case and the *San Francisco Shopping News Company* case no question of free speech was involved or even discussed, since the ordinances were aimed only at advertising matter. In the *St. John* case, which also dealt only with advertising matter, the Court expressly doubted whether it would be possible to prohibit distribution of religious and political pamphlets without interfering with the constitutional guaranty of free speech.

The *Anderson* case, which is the chief reliance of the prosecution in all these distribution cases, is really not an authoritative decision at all. It is clear that the defendants in the *Anderson* case actually did the littering since the Court distinguished between their acts which constituted distribution "upon the sidewalk" and other acts prohibited by the ordinance, namely, the handing of circulars to others on the public streets. But in any event the weight of authority, as indicated by the cases previously cited, is against the proposition that *distribution*, as distinguished from *littering*, can be prohibited. It is interesting to note, moreover, that in the *Anderson* case the Court justified its conclusion by citing *Commonwealth v. Davis*, 162 Mass. 510. The *Davis* case was considered to be authority for the view that a statute forbidding public meetings in a public park violated no rights of free speech—this Court has now repudiated that view in the *Hague* case.

The chief distinction attempted in the three cases now before this Court is that the ordinance in the *Lovell* case applied to distribution *throughout the city limits*, whereas the ordinance in the other cases applied only to distribution *on the city streets*. It is submitted that that distinction has

no validity. Many of the cases cited above held ordinances unconstitutional which were restricted only to distribution on the streets or in public places. Such, notably, was the situation in *Hague v. C. I. O.*, *supra*.

The second ground of distinction taken is that the ordinance in the *Lovell* case was not aimed at street littering, whereas the ordinance in the case at bar was so aimed. In support of that argument, reliance is placed in the case at bar (R. 10) on the statement by the Chief Justice in that case:

"It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."

It is submitted that the reference in that opinion to littering of the streets was intended to refer to the littering of streets by the person charged with the violation of the ordinance. In the case at bar the ordinance is not limited to distribution accompanied by street littering on the part of such distributor. Indeed it is not even, as construed, limited to littering by others actually resulting from distribution. For the opinion of the State Court justifies a conviction even though, as here, no actual littering did result—on the ground that all distribution tends to produce littering (R. 8).

Even an ordinance limited to distribution resulting in littering would be void because, as we have seen, freedom of speech and of the press can be restricted only where serious danger to the State is shown. Surely no one will contend that such freedom can properly be restricted merely because of fear of street littering. Moreover in order to prevent street littering means other than the complete prohibition of distribution can be employed. Municipalities can provide receptacles for waste paper, they can increase

their street cleaning force, they can probably most effectively stop street littering by arresting the actual litterers.

Finally, there is an underlying fallacy in the argument that all leaflet distribution may be prohibited because of the possible littering by the recipients. By the same logic it could be argued that all street meetings could be prohibited because of the possibility that listeners to the speakers might obstruct traffic or because some of the listeners might offer violence to the speaker. This last, indeed, was the argument advanced by Mayor Hague in the *C. I. O.* case which has met with rebuff from this Court. In such situations the evil which the municipality may correct, namely, street littering, obstruction of traffic or disorderly conduct can be prevented by the punishment of those actually committing the wrong, not by prohibition of a lawful act. As a speaker, whose address is lawful, is entitled to police protection against persons who might break up his meeting and cannot be arrested as a disturber of the peace, even though others use his speech as a pretext for violence, so the distributor of a pamphlet entirely lawful in its contents should not be subject to arrest because someone who accepts the pamphlet from his hands later throws it away.

## POINT II.

**Appellant's conviction was without due process of law in that there was no evidence of any wrongful act.**

Appellant in the case at bar was charged with the violation of an ordinance which prohibited distribution of literature (R. 17). The Appellate Court sustained his conviction on the theory that street littering can be prevented by ordinance (R. 8). Yet appellant was at no time charged with littering or even with distribution which produced or caused littering, nor was there any evidence that littering resulted.

Even if it be assumed, as has been done in the foregoing discussion, that a statute is constitutional which punishes distribution because of the littering which may result from such distribution, it is submitted that the conviction in the case at bar fails to meet the requirements of due process of law.

It is settled that it is not only the interpretation of a statute which controls, but also the manner in which the statute is applied to the facts in the particular case. See *Herndon v. Lowry*, *supra*. Therefore, even if the statute as construed is constitutional so that a distributor might be punished upon proof of littering caused by others, nevertheless he cannot be so punished unless he is charged with such offense and such littering resulted. To charge a person with distribution and to sustain his conviction on the ground that the distribution resulted in littering without proof of any littering is in itself a denial of due process. See the statement of the Chief Justice in the *DeJonge* case, *supra*, at page 362.

In the *DeJonge* case defendant had been charged with speaking at a meeting, not with anything which he did at the meeting. There was some evidence to indicate that he had distributed literature at the meeting containing illegal statements. An attempt was made at the argument of the case in this Court to suggest that the conviction could be justified on the basis of this evidence, but it was clearly pointed out by several of the Justices during the argument that no such conviction was permissible since no such charge had been made. And in his opinion the Chief Justice characterized such a possibility "as sheer denial of due process."

This Court has on numerous occasions reversed convictions where the act charged against a defendant was a wholly innocent one. Thus in *Fiske v. Kansas*, 274 U. S. 380,

this Court reversed a conviction on the ground that the evidence failed to show that any unlawful acts were advocated by the organization which defendant was charged with assisting. In *Stromberg v. California*, 283 U. S. 359, it reversed a conviction for displaying a red flag because the law punished such display "in hostility" to government without specifying that such hostility must be shown by unlawful means.

**Conclusion.**

The judgment appealed from should be reversed and the complaint dismissed.

Respectfully submitted,

OSMOND K. FRAENKEL,  
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CAROL KING,  
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*Counsel for Appellant.*



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 715 13

KIM YOUNG,

vs.

Appellant,

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR  
COURT OF THE STATE OF CALIFORNIA.

STATEMENT OPPOSING JURISDICTION AND  
MOTION TO DISMISS OR AFFIRM.

RAY L. CHESEBRO,

FREDERICK VON SCHRADER,

W. JOS. MCFARLAND,

JOHN L. BLAND,

Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 715

KIM YOUNG,

vs.

*Appellant,*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Appellee.*

**STATEMENT OF MATTER AND GROUNDS MAKING  
AGAINST THE JURISDICTION OF THE UNITED  
STATES SUPREME COURT AND MOTION TO DIS-  
MISS APPEAL OR AFFIRM JUDGMENT OF THE  
STATE COURT.**

The appellee respectfully submits a statement of matter and grounds making against the jurisdiction of the United States Supreme Court as follows:

I.

**There is no Substantial Federal Question Involved.**

—It is the position of the appellee that the ordinance out of a violation of which this proceeding arose is a legitimate exercise of the reserved police power of the State, being an ordinance having for its object the prevention of littering of the streets of the city, and that because it does fall clearly within such police power it is not within the inhibitions of the 14th Amendment to the Federal Constitution.

We think our position in this regard is fully sustained by the decision of the Circuit Court of Appeals, Ninth Circuit, in the case of *San Francisco Shopping News Co. v.*

*City of South San Francisco*, decided in 1934, and reported as 69 F. (2d) 879. Certiorari was denied by this Honorable Court in case No. 377, October Term, 1934; 293 U. S. 606.

The Circuit Court of Appeals in that case sustained the validity of an ordinance of the City of South San Francisco which read in part as follows:

"SECTION 1. It shall be unlawful for any person, firm or corporation to distribute or cause to be distributed in the City of South San Francisco, any handbill, or any printed or written advertising matter by placing or causing the same to be placed in any automobile, or in any yards, or on any porch, or in any mail box in said City, not in possession or under the control of the person so distributing the same.

"SECTION 2. The provisions of this ordinance shall not be deemed to apply to any newspaper, or any publication printing news of a general nature and keeping advertising space therein open to the public, and the publishing of general advertising matter, therein."

The court said (page 890):

"As a matter of fact, however, the ordinance in question does not purport to prohibit the business of publishing or distributing a paper of the class to which the appellant's product belongs. The ordinance merely forbids the distribution of such publication by placing it into an automobile, yard, porch, or mail box 'not in possession or under the control of the person so distributing the same.' The ordinance does not forbid the manual delivery of the publication by the carrier to a member of the household; nor, as the appellees point out, are the United States mails closed to 'Shopping News.' The enactment does not prohibit the conduct of the business in question; it merely seeks to regulate the manner in which the product shall be distributed."

and the court further said (page 891):

"If the appellant's publication belongs to a class of papers which, when delivered according to the method forbidden by the ordinance, can reasonably be said to

increase the city's fire hazard, even though the appellant's *particular* publication is delivered according to the forbidden method with such a superabundance of caution that no fire hazard could conceivably result, nevertheless the ordinance is not unconstitutional, and the appellant's publication is subject to its provisions."

The appellee is of the opinion that the case of *Lovell v. City of Griffin*, 303 U. S. 444 (82 L. Ed. 949) is not in conflict with the decision in the case last cited, and does not set forth the law applicable to the ordinance of the City of Los Angeles involved in the present proceeding for the reason that the ordinance here involved is strictly a police power measure enacted for the purpose of preventing the littering of the city streets while the ordinance involved in the case of *Lovell v. Griffin* was in fact a method of censorship, having but little, if any tendency to prevent littering of streets, as it is perfectly plain that papers distributed by permission of city authorities could litter the streets in the same way that similar papers distributed without permission could do.

By reason of the above we respectfully move the Honorable Court to dismiss the appeal in the above entitled matter and affirm the judgment of the court below.

RAY L. CHESEBRO,

*City Attorney,*

FREDERICK VON SCHRADER,

*Assistant City Attorney,*

W. JOS. MCFARLAND,

*Assistant City Attorney,*

JOHN L. BLAND,

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By FREDERICK VON SCHRADER,

*Assistant City Attorney,*

*Attorneys for Appellee, the People  
of the State of California.*

13

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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES.**

557 23 1938

October Term, 1938.

No. 715

KIM YOUNG,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Appellee.*

Appeal From the Appellate Department of the Superior  
Court of the State of California.

**APPELLEE'S BRIEF.**

RAY L. CHESEBRO,  
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✓ LEON T. DAVID,  
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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES.**

---

October Term, 1938.

No. 715

---

KIM YOUNG,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA;

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

**Foreword.**

The record does not disclose whether appellant is a citizen of the United States. This appeal is not predicated upon any asserted abridgment of the privileges or immunities of a citizen of the United States as guaranteed by the Fourteenth Amendment; only "due process of law" is involved.

Appellant's brief contains no specification of assigned errors, and the "Statement of the Case" contains what counsel for appellant seek to infer from the evidence introduced, rather than a statement of the facts themselves. Appellee has therefore undertaken to set forth in this brief a statement of the facts as they appear in the engrossed

statement in the record on appeal from the Municipal Court to the Appellate Department of the Superior Court [R. 1], and a statement of what appellee believes are the issues of law presented by such facts.

### Statement of the Case.

On March 17, 1938, on a public sidewalk adjacent to the Shrine Auditorium, in the City of Los Angeles, the appellant distributed handbills to pedestrians upon said sidewalk [R. 2], which handbills read as follows:

"Back from

War-Torn Spain

Captain

HANS AMLIE

Commander Lincoln Battalion  
Brother of Congressman Amlie

JAY ALLEN

War Correspondent Expelled From  
Rebel Spain

PEPI JUNEDA

Famous Spanish Dancer

PILAR ARCOS

Spanish Actress and Singer  
Chairman, LILLIAN HELLMAN  
Screen Writer and Playwright

TRINITY AUDITORIUM

847 So. Grand Ave.

March 21 - - - - 8:00 P.M.

Admission 25c and 50c

AUSPICES: FRIENDS LINCOLN BRIGADE  
333 W. 2nd St. - - - - MI. 7296"

[R. 4.]

Appellant had at the same time and place more than 300 handbills of the same type and nature as the foregoing, which he was proceeding to distribute to persons on said sidewalk. [R. 4.]

The opinion rendered in the court below described them as "colored cards, three and a half by five and a half inches in size." [R. 5.]

A. COMMENT ON APPELLANT'S STATEMENT OF THE CASE

Appellee respectfully submits that appellant is in error in stating, at page 3 of his brief, that:

"The handbill announced a meeting for discussion of the war in Spain."

At most, the handbill, or card, simply stated that at the place mentioned therein certain persons would appear. It contained no statement as to what was to take place. The only inference that could possibly be drawn is that there would be an entertainment. The handbill was simply a commercial advertisement calculated to procure the attendance of the public at 25c and 50c admission. Nothing contained therein had any political significance or indicated that political affairs would be discussed at the Trinity Auditorium on that date.

As to appellant's statement, at page 3 of his brief, that:

"There was no evidence that appellant had littered the streets, or that anyone else had done so, the evidence only being that at the time the appellant was in the process of distributing about 300 of these handbills,"

it seems incredible that the distribution of *over* 300 of these handbills to pedestrians could be accomplished without the street being littered with discarded handbills.

### Statement of the Questions of Law Involved.

Appellant, under two points, simply makes the broad assertion that his conviction was without due process of law, in that there was (1) a "violation of his right of freedom of speech and of the press," and (2) "no evidence of any wrongful act." Appellant has not undertaken to point out, in any degree of particularity, how, under the facts of this case, his constitutional right to due process of law has been violated, as he so broadly asserts.

Appellee believes that the questions of law involved may be summarized as follows:

1. Is a person, duly and regularly convicted of violating a city ordinance prohibiting the distribution of handbills to pedestrians upon the public streets, deprived of his liberty without due process of law on the ground that such ordinance interferes with freedom of speech and freedom of the press?
2. Is freedom of speech and of the press under the provision of the Fourteenth Amendment prohibiting the states from depriving a person of his liberty without due process of law subject to the same restrictions under the police power of the state as is any other liberty of action protected under the due process clause?
3. May a person convicted of violating a statute urge that such statute is unconstitutional as being in violation of the freedom of the press where such right is not shown by the record to be involved?

## ARGUMENT.

### Summary of Argument.

1. The validity of a statute as depriving a person of liberty or property without due process of law is determined by its reasonableness as a measure under the police power of the state. Whether such statute abridges the privileges and immunities of citizens of the United States is another question independent of due process of law and is not involved in this case.

2. The ordinance prohibiting the distribution of handbills to pedestrians upon the public streets of the City of Los Angeles is a reasonable exercise of the police power of the state.

a. Since abridgment of free speech is not the end sought to be attained by the ordinance, any interference with such right is incidental and does not make the ordinance void.

b. Since the object of the ordinance is not censorship or the restriction of the right of free speech, the reasonableness of the ordinance is not to be determined by the rule of "Clear and Present Danger".

c. It is beside the issue whether other means might be employed to prevent the littering of the city streets.

d. Since the ordinance is not a censorship measure, it is not subject to the criticism made of the ordinances involved in *Hague v. C. I. O.* and *Lovell v. City of Griffin*.

3. By reason of the nature of the contents of the handbill, freedom of the press is not involved in this case.

## POINT I.

**The Validity of a Statute as Depriving a Person of Liberty or Property Without Due Process of Law Is Determined by Its Reasonableness as a Measure Under the Police Power of the State. Whether Such Statute Abridges the Privileges and Immunities of Citizens of the United States Is Another Question Independent of Due Process of Law and Is Not Involved in This Case.**

Appellant does not complain of the regularity of the judicial process by which he was convicted. His attack is directed solely to the constitutionality of the ordinance which he was found guilty of violating. His claim of lack of due process rests upon the contention that the ordinance deprives him of his right of free speech and freedom of the press, and that the state is without power to prohibit the act for which he was found guilty. This presents a question different from that arising out of a claim that the ordinance is void as abridging a privilege or immunity of a citizen of the United States.

*New York ex rel. Bryant v. Zimmerman* (1928);  
278 U. S. 63, 72.

The prohibition against the states contained in section 1 of article XIV is threefold. They are prohibited (1) from abridging the "privileges or immunities of citizens of the United States"; (2) from depriving "any person of life, liberty, or property, without due process of law"; (3) from denying "to any person within its jurisdiction the equal protection of the laws".

Only a citizen of the United States may urge that a state law contravenes the first prohibition. This is pointed out in *Hague v. Committee For Industrial Organization*

(June 5, 1939), 83 Adv. Op. L. Ed. 928; at page 939, in the opinion delivered by Mr. Justice Stone.

If it be conceded, as stated by Mr. Justice Stone, at page 939 of the *Hague* case (83 Adv. Op. L. Ed.), "that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment," it nevertheless does not follow that under the due process clause a non-citizen may urge that the right of free speech thereby secured to him is the right of free speech secured to a citizen of the United States by the privilege and immunity clause of the Fourteenth Amendment. Nor may a non-citizen urge that because a state statute violates the privilege of free speech of a citizen of the United States it violates the right of free speech afforded non-citizens by depriving them of their liberty without due process of law.

The free speech of a citizen, that is, freedom of criticism and discussion concerning public matters and public officials, which is a political right, is certainly different from freedom of speech constituting an essential element of liberty of action secured to all persons by the due process clause of the Fourteenth Amendment. In the case of the claim that a statute is repugnant to the due process clause, the test is the reasonableness of the statute in restricting or curtailing liberty of action in the exercise of the police power of the state, and this is true even where the asserted lack of due process in limiting personal action involves the denial of free speech.

*Gitlow v. New York* (1925), 268 U. S. 652, 668;  
*Whitney v. California* (1927), 274 U. S. 357, 371;  
*Fiske v. Kansas* (1927), 274 U. S. 380, 387;

See, also:

*New York ex rel. Bryant v. Zimmerman (supra)*,  
278 U. S. 63, 72.

Therefore, under the due process clause, liberty or freedom of speech is to be tested by the same rules governing restraints upon other liberties of action, such as the right to contract or engage in particular trades or callings, or to become a member of a party or association, or to own property.

## POINT II.

**The Ordinance Prohibiting the Distribution of Handbills to Pedestrians Upon the Public Streets of the City of Los Angeles Is a Reasonable Exercise of the Police Power of the State.**

The section of the ordinance (Los Angeles Municipal Code) directly involved in this case, together with related sections, clearly demonstrates that what is prohibited is simply the distribution of handbills, dodgers, etc., to pedestrians on the streets or in places and under circumstances reasonably certain to result in littering the streets.

Section 28.00 is as follows:

“‘Handbill’ shall mean any handbill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public.”

Section 28.01 reads as follows:

"No person shall distribute any handbill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any handbill in, to or upon any automobile or other vehicle."

Section 28.02 of the Code relates to distribution on private premises, and reads as follows:

"No person shall distribute, deposit, throw, place or attach any handbill to, in or upon any porch, yard, steps or mail-box located upon any premises not in the possession of or under the control of the person distributing the said handbill, which premises has posted thereon in a conspicuous place, a sign of at least twelve square inches in area bearing the words 'No advertising', unless the person distributing the handbill has first received the written permission of the person occupying or having possession of such premises authorizing him so to do."

Another provision which sheds light upon the interpretation of section 28.00 is subdivision (j) of section 42.00 (concerning soliciting on streets), which reads as follows:

"(j) Nothing in this section contained shall be applicable to or prohibit the sale or offering for sale or the possession, control or custody of newspapers, magazines, periodicals or printed matter commonly sold or disposed of by newsboys and news venders, or shall be applicable to or prohibit persons engaged in the selling, offering for sale, or disposing of newspapers, magazines, periodicals or any such printed matter from crying, calling attention to, hawking, advertising or proclaiming the same upon any street or sidewalk."

It thus plainly appears from the foregoing provisions that there was no intention on the part of the city to prevent by section 28.01 the free expression of thought in the city. The only thing sought to be accomplished is the prevention of littering the streets and the consequent danger to health, safety, and general welfare. It may be said that newspapers thrown on the street are as likely to cause evil effects as are handbills. However, a person who is interested enough in the contents of a newspaper or pamphlet to pay for the same will, almost without exception, carry it to his office or home instead of discarding it on the street.

The wisdom and necessity for this prohibition is primarily a matter for the determination of the Council of the City of Los Angeles. That determination will not be interfered with unless from an examination of the record this court can say that such determination by the City Council is without rational basis.

*South Carolina State Highway Dept. v. Barnwell Bros.* (1938), 303 U. S. 177, 192;

*Pacific States Box & Basket Co. v. White* (1935), 296 U. S. 176, 185;

*Fifth Avenue Coach Co. v. City of New York* (1911), 221 U. S. 467, 482;

*Spoon Hing v. Crowley* (1885), 113 U. S. 703, 708.

There is nothing in the record which tends to show that the prohibition of the distribution of handbills and dodgers upon the public streets was not a reasonable exercise of discretion on the part of the City Council of the power of the City to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Cal. Const., Art. XI, Sec. 11.)

As stated by the court below in its opinion:

"We do not subscribe to the doctrine that the city council could prohibit the distribution of handbills on the city streets in the absence of any public interest to be served by the prohibition, just because the streets are 'city' streets, under the council's charge;  
\* \* \*." [R. 7.]

The lack of a showing of any arbitrary action or non-existence of a public purpose in adopting the ordinance is best summed up in the language of the opinion rendered in the court below:

"Looking at the code before us, we cannot say that the city council had no reasonable cause for prohibiting the distribution of handbills on the sidewalks of the city, or that the city council acted arbitrarily in determining that some measure other than, or short of, such prohibition would not meet the needs reasonably well. Experience teaches that the immediate result of the indiscriminate distribution of handbills on public streets is the littering of those streets. Curiosity and courtesy would induce most persons to take one of the cards offered by appellant; a glance, and lack of further interest, would release it from the hand. Those who are charged by law with determining the public policy which shall govern, may well have seen the problem as it was stated in *Anderson v. State*, *supra*, 69 Neb. 686, 96 N. W. 149, 150, 5 Ann. Cas. 241, as quoted in *City of Milwaukee v. Kassen*, (1931) 203 Wis. 383, 234 N. W. 352, 353: 'The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and

obstruct gutters and catch-basins, and keep the streets in an unclean and filthy condition." The evil against which the code appears to have been directed [fol. 16] is to be measured not merely by appellant's three hundred cards, but by the flood which might reasonably be expected if the code ceased to operate as a dike." [R. 7-8.]

Appellee believes that this Court can take judicial notice of the fact that the City of Los Angeles is, for the most part, built on a flat terrain so that the natural drainage of storm waters is inadequate. Long dry spells are prevalent, often followed by severe rains, resulting in a heavy flow of water onto the streets in the level portions of the city, to which is added the water from the hills located to the north and west of the main portion of the city. Adequate and efficient storm drains are essential to the health and safety of the inhabitants, and practically the entire county is included in a flood control district, to which has been recently added millions of dollars of drainage district improvements, which this Court had under consideration in *Chesebro v. Los Angeles County Flood Control Dist.* (1939), 306 U. S. 459. An uncontrolled distribution of papers of any kind on the streets is bound to result, more or less, in stoppage of storm drains, with the result that when such floods come serious injury will result.

Moreover, it would present an anomalous situation if municipal authorities could, in the interest of public health and safety and the general welfare, establish setback lines for buildings or require open areas on each lot

(*Gorieb v. Fox* [1927], 274 U. S. 603), or require that certain districts be restricted to residence purposes only (*Zahn v. Board of Public Works of the City of Los Angeles* [1927], 274 U. S. 325), or even prohibit the use of streets for advertisement purposes (*Fifth Avenue Coach Co. v. City of New York* (1911), 221 U. S. 467, 482), but be without power to adopt ordinances to prevent the streets of the community from being littered with trash.

A. SINCE ABRIDGMENT OF FREE SPEECH IS NOT THE  
END SOUGHT TO BE ATTAINED BY THE ORDINANCE,  
ANY INTERFERENCE WITH SUCH RIGHT IS INCI-  
DENTAL AND DOES NOT MAKE THE ORDINANCE VOID.

It cannot be seriously urged that it is beyond the power of a municipality to prevent the scattering of blank pieces of paper or the distribution of commercial advertisements in such manner as will result in littering the streets.

*San Francisco Shopping News Co. v. City of South San Francisco* (1934), [C. C. A. 8th] 69 Fed. (2d) 879, 892 (Cert. denied, 293 U. S. 606);

*Sieroty v. City of Huntington Park* (1931), 111 Cal. App. 377, 381 (Pet. for Hrg. by Supreme Court of Calif. denied, 111 Cal. App. 381);

*People v. St. John* (1930), [App. Dept. Superior Ct.] 108 Cal. App. 779, 784;

*City of Milwaukee v. Kassen* (1931), 203 Wis. 383, 384;

*Almassi v. City of Newark* (1930), 8 N. J. Misc. 420, 422, 150 Atl. 217, 218;

*Com. v. Kimball* (1938), [Mass.] 13 N. E. (2d) 18, 21.

See, also:

*Lovell v. Griffin* (1938), 303 U. S. 444, 451.

It is obvious that the effect of the distribution of handbills, dodgers, etc., on the streets will be substantially the same whether they contain printed matter of a commercial nature or political or religious matter. (*City of Milwaukee v. Kassen* (*supra*), 203 Wis. 383, 385.) It therefore follows that prohibiting the distribution of handbills, etc., to persons on the public streets, in order that the streets may be properly maintained, interferes only incidentally, if at all, with freedom of speech.

As pointed out in the opinion rendered in the court below, although an ordinance may operate as an abridgment of the right of free speech, the ordinance may still be valid if the abridgment is not the end sought by the ordinance but is merely incidental to the operation of the means reasonably adopted to attain a lawful end. [R. 7.]

This is but the application of the well-settled rule that a police regulation intended as such and not operating unreasonably beyond the occasion of its enactment is not rendered void or invalid by the fact that it may incidentally affect some right guaranteed by the Constitution, as, in effect, held in the opinion of Mr. Justice Roberts in the *Hague* case (83 Adv. Op. L. Ed., p. 937) in distinguishing it from the case of *Davis v. Massachusetts*, and as announced in *State v. Gibbes* (1933), 171 S. C. 209, 218, and *People v. Alterie* (1934), 356 Ill. 307, 308; see, also, *Francis v. People* (1926), (C. C. A. 3d), 11 Fed. (2d) 860, 865.

B. SINCE THE OBJECT OF THE ORDINANCE IS NOT CENSORSHIP OR THE RESTRICTION OF THE RIGHT OF FREE SPEECH, THE REASONABLENESS OF THE ORDINANCE IS NOT TO BE DETERMINED BY THE RULE OF "CLEAR AND PRESENT DANGER."

In *Herndon v. Lowry* (1937), 301 U. S. 242, this Court, speaking through Mr. Justice Roberts stated, at page 258, that:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government.

\* \* \*

This is the rule announced in the many decisions of this Court construing the constitutionality of statutes directed at sedition, criminal syndicalism and other acts aimed at the overthrow of organized government—statutes whose direct object is the curtailment of speech in the interest of the preservation of the government. To sustain a conviction under such a statute the words used must be used under circumstances and be of such a nature as to create a clear and present danger that they will bring about the situation which the states or the United States has a right to prevent. But there need be no clear and present danger to the government in order to uphold the validity of a statute which regulates or prohibits conduct generally in the interest of the public peace, health, safety, morals or the general welfare of the public. All that is required in order to sustain the validity of such a statute—and the ordinance in question is of this class—is that it bear a reasonable relation

to the public health, peace, safety, morals or general welfare.

As heretofore pointed out, the object of the ordinance involved in the case at bar is not to prevent the dissemination of knowledge, information or ideas, but simply to prevent the littering of the streets. This is clearly demonstrated by the express provision in subdivision (j) of section 42.00 (governing soliciting on the streets), that:

“(j) Nothing in this section contained shall be applicable to or prohibit the sale or offering for sale or the possession, control or custody of newspapers, magazines, periodicals or printed matter commonly sold or disposed of by newsboys and news venders, or shall be applicable to or prohibit persons engaged in the selling, offering for sale, or disposing of newspapers, magazines, periodicals or any such printed matter from crying, calling attention to, hawking, advertising or proclaiming the same upon any street or sidewalk.”

C. IT IS BESIDE THE ISSUE WHETHER OTHER MEANS MIGHT BE EMPLOYED TO PREVENT THE LITTERING OF THE CITY STREETS.

That the same object might be accomplished by requiring the distributor to pick up handbills handed out by him and thereafter thrown upon the street, or by making it unlawful for any person to whom a handbill has been handed to throw it on the street, is wholly beside the point. Obviously, prosecution for the violation of such provisions would present practical difficulties that would make the securing of convictions almost impossible. This Court is not concerned with the relative adequacy, appro-

priateness, or practicability of the particular form of the regulation adopted in the public interest.

*Nebbia v. New York* (1934), 291 U. S. 502, 537;

*New Orleans Public Service v. City of New Orleans* (1930), 281 U. S. 682, 686;

*Jones v. City of Portland* (1917), 245 U. S. 217, 224.

Under the police power any practice which tends to endanger the health, safety or welfare of the public may be prevented.

*Purity Extract Co. v. Lynch* (1912), 226 U. S. 192, 201;

*Hebe Co. v. Shaw* (1919), 248 U. S. 297, 304;

*Euclid v. Ambler Realty Co.* (1926), 272 U. S. 365, 388;

*Marcy Inc. v. Mayo* (1931), 103 Fla. 552, 577.

The same reason which warrants the enactment of laws for the prevention of epidemics or fires by prohibiting conditions which give rise to the danger applies with equal force to the prevention of conditions which give rise to the scattering of trash upon the public streets.

D. SINCE THE ORDINANCE IS NOT A CENSORSHIP MEASURE, IT IS NOT SUBJECT TO THE CRITICISM MADE OF THE ORDINANCES INVOLVED IN *HAGUE V. C. I. O.* AND *LOVELL V. CITY OF GRIFFIN*.

Appellee believes that it has been clearly demonstrated that the ordinance involved is not intended as a censorship measure nor has it, in fact, the effect of such a measure. Therein lies the distinction between the case at bar and *Hague v. Committee for Industrial Organization* (1939), 83 Adv. Op. L. Ed. 928, and *Lovell v. City of Griffin* (1938), 303 U. S. 444, relied on by appellant.

The distinction pointed out by Mr. Justice Roberts in the *Hague* case between the ordinance involved in that case and the one in *Davis v. Massachusetts*, 167 U. S. 43, is the feature which distinguishes the *Hague* case from the case at bar. As stated by Mr. Justice Roberts, at page 937 (83 Adv. Op. L. Ed. 928):

"The ordinance there in question apparently had a different purpose from that of the one here challenged, for it was not directed solely at the exercise of the right of speech and assembly, but was addressed as well to other activities, not in the nature of civil rights, which doubtless might be regulated or prohibited as respects their enjoyment in parks. In the instant case the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks.

"We have no occasion to determine whether, on the facts disclosed, the *Davis* Case was rightly decided, but we cannot agree that it rules the instant case. \* \* \*

Conversely, as the ordinance in the case at bar is not directed at the right of speech and assembly but at the proper regulation of the streets, the decision in the *Hague* case does not rule the case at bar.

In *Lovell v. City of Griffin* (*supra*), as stated by Mr. Chief Justice Hughes, "the ordinance in its broad sweep prohibits (without permission of the city manager) the distribution of 'circulars, handbooks, advertising or literature of any kind.' It manifestly applies to pamphlets, magazines and periodicals" (p. 450). "The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit

from the city manager". (p. 451). As pointed out by the Chief Justice, legislation of the type involved in the ordinance in that case "would restore the system of license and censorship in its baldest form" (p. 452). No limitation was placed upon the power of the city manager to refuse a license even though the matter sought to be circulated was not obscene, offensive to public morals and did not advocate unlawful conduct, and irrespective of whether the distribution be on the city streets or on private property. The vice of the ordinance as a means of unbridled censorship is also to be found in the ordinance involved in the *Hague* case.

- The ordinance in the case at bar permits absolute freedom of expression by all means and in all places and without the necessity of obtaining any license except that handbills and dodgers may not be distributed on the public streets and that prohibition is absolute in the interest of the public welfare and not dependent upon the discretion of any executive official of the city.

The ordinance is a reasonable measure calculated to prevent the streets of the city from being littered with trash. The ordinance is not aimed at curtailing freedom of speech and any interference with such right is only incidental and innocuous in its effect upon the validity of the ordinance. The ordinance not being a censorship measure of the right of free speech, its reasonableness is not to be determined by the rule of "clear and present danger", nor by the rule laid down in the *Hague* case and in *Lovell v. Griffin*. That other means might have been employed to effect the desired object is wholly immaterial. It is therefore apparent that it is a valid ordinance and that a judgment of conviction for a violation of its provisions must be affirmed.

### POINT III.

#### By Reason of the Nature of the Contents of the Handbill, Freedom of the Press Is Not Involved in This Case.

Even though freedom of the press be one of the liberties protected by the due process clause of the Fourteenth Amendment (*Grosjean v. American Press Co.* [1936], 297 U. S. 233, 244), freedom of the press is not involved in this case. As pointed out by the court below, in its opinion:

"Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views." [R. 11.]

In *Cooley's Constitutional Limitations* (7th Ed.), it is stated, with reference to liberty of speech and of the press, that (p. 604):

"An examination of the controversies which have grown out of the repressive measures resorted to for the purpose of restraining the free expression of opinion will sufficiently indicate the purpose of the guaranties which have since been secured against such restraints in the future. Except so far as those guaranties relate to the mode of trial, and are designed to secure to every accused person the right to be judged by the opinion of a jury upon the criminality of his act, their purpose has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in

the exercise of the authority which the people have conferred upon them. To guard against repressive measures by the several departments of the government, by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation, was the general purpose;

\* \* \*

The handbill or card involved in the case at bar does not relate to any of the matters embraced within the concept of freedom of the press. Appellant's reliance upon freedom of the press is similar to the position taken by the appellant in *Mutual Film Corp. v. Industrial Commission* (1915), 236 U. S. 230, wherein it was urged that there could be no censorship of motion picture films as it would be an interference with the freedom of the press. This Court, however, pointed out that appellant's business is not embraced within the concept of freedom of the press. Since freedom of the press is not shown by the record to be involved, the question need not be discussed. As stated by this Court in *Associated Press v. National Labor Relations Board* (1937), 301 U. S. 103, 132:

"Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances."

Since the record shows that the handbills or cards were in the nature of commercial advertisements, the question resolves itself into the right of the municipality in the reasonable exercise of the police power to prohibit using the streets for advertising purposes—a right which this Court has held to be possessed by municipalities. (*Fifth Avenue Coach Co. v. City of New York* [1911], 22 U. S. 467, 482.)

### Conclusion.

Since appellant is not deprived of his liberty of action, including that of freedom of speech, without due process of law by a statute enacted under the police power of the state in the interest of the health, safety or general welfare of the public, and since the ordinance which appellant was convicted of violating is a reasonable exercise of that power of the state, it follows that there has been no violation of appellant's right of free speech or liberty of the press, and that appellant's acts were of such nature as to be within the police power of the state to prohibit.

It is respectfully submitted that the judgment of the Appellate Department of the Superior Court should be affirmed.

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